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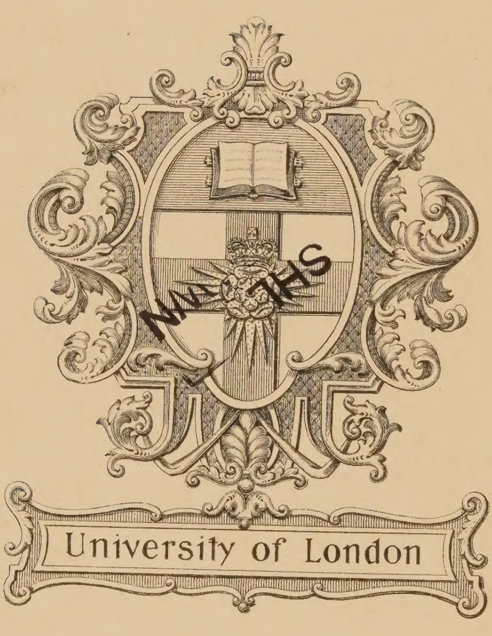

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THE INTERNATIONAL SETTLEMENT AND THE FRENCH CONCESSION AT SHANGHAI

By SIR JOHN T. PRATT, K.B.E., C.M.G.

THE City of Shanghai is situated some ten miles up the Whangpoo, a creek near the mouth of the Yangtse. It is the natural port for the trade of that great river which serves a hinterland inhabited by 180 million people—one tenth of the inhabitants of the globe. The provinces in the Yangtse delta are among the most densely populated and richest regions in the world and are covered with a network of creeks and canals providing admirable means of transport and communication. Long before its discovery by Europeans Shanghai was one of the premier trading stations in eastern Asia, and early adventurers who found their way there were astonished at the forest of masts of the great junks that thronged the river. Shanghai is the sixth largest city in the world, with a population of about 3½ millions; through it passes some 45 per cent. of the total trade of China, and by virtue of its preeminent position as a commercial, banking, shipping, and industrial centre it plays an essential part in the economic life of China as a whole. Nearly half the population of Shanghai resides in the French Concession and the International Settlement. These two foreign-administered areas occupy between them some 12½ square miles, and in the International Settlement, with its six miles of river frontage, are concentrated most of the banks, business houses, wharves, docks, warehouses, factories, and public utilities of Shanghai.

The International Settlement at Shanghai had its origin in a set of Land Regulations promulgated by the Taotai (the chief local Chinese territorial official) on November 29, 1845, with the approval of the Viceroy at Nanking. Shanghai was one of the five ports opened to foreign trade and residence by the Treaty of Nanking of 1842. The first British Consul arrived at the port in November 1843 and immediately entered into negotiations with the Taotai with regard to the right to trade, and to reside and acquire land and houses, conferred by the treaty on his nationals. The various points agreed upon during the ensuing two years were embodied in the Regulations of 1845, which, though in form the unilateral act of the Chinese Government, really represent an international agreement. Article 2 of the Treaty of Nanking stipulated that

> "British subjects with their families and establishments shall be allowed to reside for the purpose of carrying on their mercantile pursuits without molestation or restraint" [at the five ports (afterwards to be known as Treaty Ports), and Article 7 of the Supplementary Treaty of the Bogue of October 8, 1843, stipulated that at these ports] "ground and houses, the rent or price of which is to be fairly and equitably arranged for according to the rates prevailing among the people, without exaction on either side, shall be set apart by the local officers, in communication with the consul, and the number of houses built or rented will be reported annually to the said local officers by the Consul for the information of their respective Viceroys and Governors, but the number cannot be limited, seeing that it will be greater or less, according to the resort of merchants."

This may seem a somewhat exiguous treaty basis for the great city into which the original British site has now grown, but in fact the interpretation spontaneously put upon these treaty clauses on both sides was that a site should be set apart, within which the merchants might provide themselves with amenities such as good roads and cleanly surroundings, which the Chinese at that time did not value and were not able to provide. This was not regarded by the Chinese as being in any degree an invasion of their sovereign rights; on the contrary it was in complete harmony with the idea of the devolution of responsibility which lies at the root of all Chinese administration. All that was contemplated at first was a modest little British settlement; the growth of the acorn into a great oak is one of the romances of modern history.

The Land Regulations of 1845, twenty-three in number, dealt with the method of acquiring land in the area set aside, the laying out and repair of roads, building of jetties, bridges, drains, and a public market. Inflammable buildings and explosives were prohibited; the land renters were to "agree together about contributing towards the expenses", and were allowed to levy wharfage dues. Three merchants chosen by the British Consul acted as a Committee of Roads and Jetties. The regulations contemplated that the land would be gradually acquired by foreigners from its native owners, and that Chinese would in time be excluded from the settlement. Non-British foreign nationals were allowed to take up land with the consent of the British Consul, but they were to observe the land regulations, and any breach of the regulations was to be punished by the British Consul. These provisions, however, obviously conflicted with the rights of other powers, and particularly of France and of the United States of America, who had signed treaties containing clauses similar to those in the

British treaty. An American citizen had the treaty right to acquire land from a native owner anywhere in the Treaty Port, and it was an infringement of this right to lay down that in this particular area he must apply for the consent of the British Consul. It was also obviously improper for a British Consul in China to assume jurisdiction over foreigners other than his own nationals without the consent of their government; but if foreigners could take up land at pleasure in the British Settlement without any obligation to conform to the land regulations the working of the regulations would become impossible. The alternative to an exclusively British Settlement was a settlement in which all foreigners would enjoy equal rights and which would be administered under regulations agreed to by the representatives of the various powers and enforced by them upon their respective nationals. Such a code duly approved by the Treaty powers and passed unanimously at a public meeting of the land renters was promulgated by the Taotai in August 1854. Again we have here what amounts to a multilateral agreement between the Chinese Government and all the Treaty powers the provisions or existence of which can only be changed by agreement between all concerned.

This development had been accelerated by the events of the previous year. In 1853 a rebellion that had then been raging for some years spread to the Yangtse region and rebels captured the native city of Shanghai. It became necessary to mobilize the volunteers and to land forces from the foreign men-of-war in order to drive away the Chinese soldiers from the borders of the foreign settlement. (This affair is known in Shanghai history as the Battle of Muddy Flat.) The British Admiral, however, took the view that to land troops on foreign soil at the invitation of three Treaty Consuls was a wholly irregular proceeding; it was the duty of the Chinese Government to protect foreign merchants, and foreign troops could only be landed to assist in performing this duty at the invitation of the Chinese Government or of some properly constituted local authority acting on its behalf. In framing the new municipal code, the British Consul therefore aimed at clothing the land renters by delegation from the Chinese Government with such powers as would transform them into the properly constituted authority contemplated by the Admiral. The Land Regulations of 1854 accordingly provided for an elected representative body, for the organization of a police force, and for the exercise of compulsory powers of taxation. In subsequent years the foreign powers have not deemed it necessary to await the invitation of any such body as the Shanghai Municipal Council before intervening for the protection of the lives and property of their nationals. They have in fact held themselves free to exercise the normal rights of protection (amounting in certain circumstances to armed protection) permitted by international law. From the Battle of Muddy Flat, however, dates the doctrine, accepted by the Chinese Government, that the International Settlement is entitled to maintain an armed neutrality in China's civil wars and that Chinese troops may not enter the Settlement except with the consent of the Shanghai Municipal Council. The corollary of this doctrine is of course that, if Chinese troops have no right of entry into the Settlement, the Settlement shall correspondingly not be used by any of the Settlement powers as a base of aggressive military operations against the Chinese, or for any other purposes but purely defensive ones. The neutrality of the Settlement cannot be a one-way affair.

In 1849 the French Consul applied to the Taotai for a site to be set apart for French merchants similar to that set apart in 1845 for English merchants. As there was no French trade, and the whole French mercantile community consisted of one shopkeeper, the Taotai demurred, but eventually yielded to pressure and set apart a site (between the English Settlement and the city) solely for French nationals. His proclamation ended with the following sentence: "Quant aux individus des autres nations qui voudraient louer des terrains à l'intérieur de la concession, ils devraient s'adresser au Consul français, pour délibérer avec lui et arriver à la conclusion de l'affaire." The American Consul protested as vigorously against this provision as he had against the similar provision relating to the English Settlement, with the result that for several years the French site remained derelict. In 1854 the French authorities agreed that the new code of land regulations should apply to both the English and French areas. These regulations provided that any foreigner desiring to acquire land from the Chinese proprietor should apply to his own Consul and the land in the French area was then gradually taken up by various foreign nationals—mostly English and American. It was not, however, till some ten years later that the Shanghai community learnt to their astonishment that the amalgamation of the two areas had not been approved by the French Government. Considerable irritation had, in the meantime, been caused by the fact that the Council elected under the 1854 regulations had not been allowed to exercise any functions in the French area, which had remained under the personal autocratic rule of the French Consul.

The disturbances of 1853 caused a great influx of Chinese into the Settlement, and the idea of reserving the Settlement for foreigners had henceforth to be abandoned. In 1861 and 1862 there were further disturbances and another enormous influx of Chinese. This gave rise to difficulties of administration with which it was difficult to deal under the limited powers conferred by the 1854 regulations. The foreign population had also increased and doubts had arisen whether the regulations could legally be enforced against foreign nationals. The provision of an amended code had therefore become a matter of great urgency, and eventually in 1866 a revised code was accepted at a public meeting of land renters. In the meantime, by virtue of an agreement of June 25, 1863, an area in the district known as Hongkew, north of the Soochow Creek, had been set aside as the American Settlement, and had been immediately amalgamated with the English Settlement under the 1854 regulations. It was still hoped that the French would accept the revised draft of 1866 as applicable to their area, and thus effect the amalgamation of all three areas, but the French Government definitely refused and on September 1, 1866, the French Consul promulgated a "Règlement d'organisation municipale de la concession française de Changhai". The French proposed that they should accept the revised code of Land Regulations now being elaborated for the Anglo-American Settlement and that the other powers should accept the Règlement in such a manner as to make it legally binding upon their nationals residing in the French Concession. But the refusal of the United States to accept this proposal caused a prolonged deadlock to ensue. In 1869 the land regulations were revised once more and sent to Peking with a despairing communication from the Municipal Council to the effect that the legal enforcement of taxes was becoming more difficult every day, and that there was a serious risk of a complete break-down in the municipal administration. Faced with this crisis, the Ministers in Peking signed a joint minute provisionally sanctioning, on behalf of their respective governments, both the revised code of land regulations and the French Règlement, as revised in 1868. The land regulations of 1869 with only slight amendments have remained in force until the present time, and represent as already stated a general agreement on the subject between the powers concerned, including China.

During all the years that the revised code of land regulations had been under discussion, three objects had been kept steadily in view: that the extended powers which the Municipal Council were to exercise should be delegated to them by the Government of China; that the code should be legally enforceable against all nationals residing in the Settlement; and that the Council should contain a Chinese element. It is remarkable that in the code, as eventually sanctioned and put into operation, none of these objects was achieved, and still more remarkable that no serious inconveniences seem to have flowed from at any rate the first two of these omissions. As regards the third, the article providing for Chinese representation was omitted from the 1869 Regulations, apparently on the ground that the time was not yet ripe for Chinese participation in representative institutions. That the proposal was, in fact, premature would appear to be indicated by the facts that the corresponding article in the French Règlement remained a dead letter till 1914, and that Chinese representation did not become a live issue in the International Settlement until 1906. The helpful attitude of the heads of the native guilds, after the riots that had occurred just previously in the International Settlement, prompted the Municipal Council in that year to propose the organization of a Chinese committee with whom the Council might hold regular meetings. Die-hard influences in the foreign community caused this promising development to be nipped in the bud. In 1920 a resolution in favour of Chinese representation was heavily defeated at the annual meeting of ratepayers, but a Chinese Advisory Committee was appointed in 1921. By 1926 opinion in the foreign community had become more liberal, and a resolution was passed in favour of Chinese representation. In 1928 three Chinese members, chosen by the Chinese community through the Chinese Ratepayers' Association and other organizations, took their seats as full members of the Council, and six other Chinese were added to the various Council committees. In 1930 the number of Chinese members of Council was raised to five.

The consuls at Shanghai appear to have deferred consulting the local Chinese authorities till their own domestic differences over the new code had been composed. The Ministers in Peking, fearing an imminent break-down of the whole administration, took it upon themselves to sanction the code; and, when it was found that no one objected, there seems to have been a tacit conspiracy to leave well alone. In subsequent years the Chinese authorities in various direct and indirect ways recognized the validity of the code. In the Agreement of 1930, relating to the Chinese courts in the Settlement, it was specifically laid down that the land regulations and by-laws should be enforced, so that any doubts that may have existed on the subject were then finally set at rest. As regards foreign nationals, it was not until 1881 that the regulations were made binding by Order in Council upon British subjects. The nationals of thirty-five different powers reside in Shanghai and, of these, fourteen possess extra-territorial rights.

> "In ten out of these fourteen extra-territorial courts" [says Mr. Justice Feetham] "the authority of the land regulations and by-laws is now recognized as binding on the subjects of the powers concerned. In the other four cases there seems still to be some room for doubt. There is, for instance, still some uncertainty as to the precise legal position as regards the application of the provisions of the land regulations and by-laws to citizens of the United States, though no doubt in view of the active participation by American citizens as voters and as members of the Council in the affairs of the Settlement the feeling of the American community would be against taking advantage of such doubts; the taxes and rates due to the Council of the Settlement from American citizens are in the great majority of cases willingly paid without resort to legal proceedings, and traffic regulations are in practice enforced by the American court as being generally in accordance with similar regulations enforced in the United States.
>
> "The other three countries in respect of whose citizens there is some doubt as to the application of the land regulations and by-laws are only represented by comparatively small numbers in the foreign population of the Settlement."

A somewhat similar position exists with regard to the French Règlement of 1868. It was sanctioned by the Joint Minute of 1869, but was never referred to the Chinese authorities or made binding by Order in Council on British subjects. In 1899, in order to remove British objections to an extension of the French Concession, a formal undertaking was given that "all municipal regulations should be submitted to the British Minister before being enforced on British subjects". Various amendments, however, have been promulgated by Ordonnance Consulaire, without any reference either to the ratepayers, the Chinese authorities, or the other Treaty Powers. In particular the following addition in 1915 to Article 8 entirely altered the character of the constitution:

> "En temps de guerre, les délais prévus pour la suspension et la dissolution du Conseil d'Administration Municipale pourront être prolongés pendant toute la durée de la guerre."

In 1926 this was extended to cover civil war. Since then no elections have been held, and instead of the Conseil d'Administration a Commission Provisoire has been appointed by the Consul. Inability to enforce their regulations on foreign nationals by legal process has not, however, proved a source of serious embarrassment to the French authorities. In a case within the writer's recollection a British subject who had obstructed traffic with his car in the French Concession for ten minutes was summoned in the British court. The magistrate held that the relative by-law was not binding on British subjects, and dismissed the case. Next day the secretary of the French municipality drove his car into the International Settlement, placed it across the tramlines in the Nanking road, and, watch in hand, kept it there for ten minutes. Honour having been satisfied by this characteristically Gallic gesture, he drove back to his own Concession.

Article 22 of the French Treaty of Whampoa of 1843 was in similar terms to Article 7 of the British Treaty quoted above, and the Taotai's proclamation of April 7, 1849, setting aside a site for French merchants merely declared that within this area they might acquire land from the native owners. The interpretation placed by the French upon these instruments was that, in regard to the area set aside, the French Consul was "revêtu, par délégation du gouvernement chinois, de la plénitude des pouvoirs administratifs en matière municipale", and they have successfully maintained this position ever since against the Government of China and the governments of other powers. The constitution set up by the Règlement, which differs considerably from the Anglo-Saxon ideals enshrined in the Land Regulations, is described with admirable lucidity in the following dispatch from the French Foreign Office to the British Ambassador in Paris of June 6, 1866:

> "Quoique revêtu, par délégation du gouvernement chinois, de la plénitude des pouvoirs administratifs en matière municipale, le Consul Général n'exercera directement, à l'avenir, que ceux de ces pouvoirs qui se rattachent au maintien du bon ordre et de la sécurité publique. Pour ce qui concerne les autres branches d'administration, il sera seulement investi d'une sorte de contrôle supérieur et tutélaire; membre de droit du corps municipal, il en aura la présidence et le convoquera toutes les fois que sa réunion sera jugée utile. Le conseil sera appelé, comme assemblée délibérante, à voter le budget, les impôts, les règlements de voirie et de salubrité, et en général, toutes les mesures qui se rapportent au service municipal; ses délibérations seront validées par des arrêtés consulaires, et celles qui concerneront des questions de budget ou d'impôts devront toujours être rendues exécutoires. Administrativement, le conseil sera chargé des services municipaux proprement dits, ainsi que de la perception des impôts et du maniement des fonds; il nommera et révoquera ses employés sauf à faire approuver ses choix par le Consul Général.
>
> "Les conseillers municipaux seront dorénavant désignés par la voie de

l'élection. Les étrangers jouiront de droit de vote aux mêmes conditions que les français, et ils entreront pour moitié dans la composition du conseil."

Under the Land Regulations of 1869 all foreign residents in the Settlement, whether enjoying extra-territorial privileges or not, who possess a certain property qualification, are entitled to vote at an annual election for nine councillors. At the annual meeting held shortly after the election, the ratepayers pass the budget and accounts (previously printed and circulated), and authorize the levy of rates and taxes. Special meetings may be held to approve new by-laws, or decide any matter not within the authority of the Council. The Council is charged with the general administration of the Settlement. Its specific powers set out under the Land Regulations are few, and cover such matters as construction of public works, cleaning, lighting, and watering the Settlement, maintaining a police force, and acquiring land for public purposes. The varied activities of the public health department (which employs a staff of 140 foreigners and nearly 600 Chinese) are covered by the word "cleaning", and there is no mention in regulations or by-laws of volunteers, fire brigade, hospitals, schools, library, market, or jails, but the phrase in Article 9, "better order and good government of the Settlement", is held to cover anything for which the ratepayers are prepared to vote funds. Within the limits imposed by the regulations and by-laws the powers of the Council and ratepayers are absolute, and are not subject to the control or the veto of any national government, Chinese or foreign. The Council does not itself supply public utilities, but in regard to water, gas, electricity, telephones, and public transport has granted franchises on carefully prescribed terms to public companies. The individual members of the Council are not personally responsible for their acts as such, but the Council may be sued in a court of foreign consuls established by Article 27. This court generally consists of three consuls elected annually by the consuls of those powers having treaties with China granting extra-territorial rights. The regulations do not prescribe what law is to be administered by the Court of Consuls. Each of the fourteen powers that enjoy extra-territorial privileges maintains a court in the Settlement for the trial of cases in which its nationals appear as defendant or accused. In most cases the consul or consul-general is judge of the court, but in the case of Great Britain and the United States of America special courts have been established in Shanghai: His Britannic Majesty's Supreme Court, and the United States Court for China respectively. Chinese courts are also established in the Settlement for the trial of cases in which Chinese or non extra-territorial foreigners are defendant or accused. The courts of the fourteen powers have been established for the exercise of extra-territorial jurisdiction in China and have no organic connexion with the Settlement as such. The Court of Consuls and the Chinese courts are, however, integral parts of the Settlement administration.

For the first nineteen years of the Settlement's existence no special provision was made for courts to deal with Chinese offenders. The American and British Consuls, however, found it convenient to assume jurisdiction in respect of offences committed by Chinese in the Settlement. They divided the work between them, inflicting punishment in trivial cases, and sending the more serious cases, after a preliminary inquiry, for trial by the city magistrate. In 1856 the consuls obtained the consent of the city magistrate to the sentencing of offenders to labour in a chain gang on the roads, provided the Municipal Council would feed them. These patriarchal arrangements became inadequate after the great influx of Chinese in 1861 and 1862 referred to above. In 1864 the Chinese were persuaded to establish a Chinese court in the Settlement. A set of rules was agreed on and put into operation as from January 1, 1866. A new set of rules proposed by the Chinese authorities was accepted and put into force in 1869, and remained in force until January 1, 1927. They provided that a Chinese officer with the rank of Sub-Prefect should preside over the court with civil and criminal jurisdiction and with power to inflict minor punishments. Grave offences were to be sent to the city magistrate for trial. The Sub-Prefect sat alone except when a foreigner was concerned in a case, and then the consul of the nationality concerned, or his deputy, had the right to sit with him as assessor. The 1866 rules authorized the erection of a jail by the Municipal Council for the custody of Chinese prisoners, with the consent of the Taotai. The 1869 rules authorized the Sub-Prefect "to examine Chinese judicially, to detain them in custody and to punish them. . . ." The court was known as the Mixed Court, and the Sub-Prefect the Mixed Court Magistrate. These were misnomers, for the court was a Chinese court, administering Chinese law to persons under Chinese jurisdiction. The established practice, however, became that in all criminal cases a foreign assessor (a vice-consul) sat with the magistrate, presumably on the ground that the foreign community had an interest in the maintenance of order, that male offenders were imprisoned in the municipal jail, while the Mixed Court magistrate had the custody of female offenders and of all defendants detained in Chinese civil cases. Gradually the foreign assessor assumed something of the powers of co-judge. After 1900, however, a tendency began to manifest itself to resist foreign encroachments, and in 1905 a formidable riot was caused by an ill-judged attempt by the Municipal Council to take over the custody of female prisoners. Nationalist influences received a set back in the revolution of 1911–12 which caused a vital change in the constitution of the court. The Imperial authorities in Shanghai fled from their posts, but before doing so they resigned their control over the Mixed Court to the Consular body. This initiated an anomalous system in which the Mixed Court magistrates were appointed by the Consular body and paid by the Municipal Council. Foreign control enabled great improvements in the administration of the court to be effected. Many Chinese abuses were swept away, but unfortunately other abuses took their place. Foreign assessors were now allowed to sit and foreign lawyers to plead in purely Chinese civil cases where formerly the Chinese magistrate had sat alone. Any one of the eighteen consuls in Shanghai was entitled to claim that the interest of one of his nationals was concerned in any case that came before the court. His statement to that effect could not be questioned, and sufficed to place an assessor of that nationality on the bench for the trial of the case. The corruption and injustice that resulted from this system gave rise to a growing agitation for the return of the Mixed Court to Chinese control. Eventually an agreement was signed under which, on January 1, 1927, the Chinese Government established in the Settlement in place of the Mixed Court a court known as the Provisional Court. By this agreement many of the Chinese grievances were remedied, and, in particular, foreign assessors were no longer allowed to sit in Chinese civil cases. In criminal cases, however, assessors appointed by the Consular body sat in such cases as directly affected the peace and order of the settlement. Though their powers were limited to protesting against decisions that they considered to be wrong, this provision, during the three years of the Provisional Court's existence, gave rise to much friction. Accordingly in 1929–30 a new agreement was negotiated, under which the assessor system was swept away altogether, and, in place of the Provisional Court, courts were established—a District Court and a branch High Court—that are integral parts of the modern Chinese system of judicial administration. The working of this agreement has been wholly satisfactory. There is no longer any sense of grievance or friction, and good relations have been established between the courts and the Settlement authorities. Complaints are heard of delays in civil suits caused by the defects of Chinese judicial procedure, but this is a separate question from that of the International Settlement. The main features of the 1930 agreement are as follows. The powers and functions of the procurators under Chinese law are modified in certain respects. Judicial police whose function it is to serve judicial processes such as summonses, warrants, orders, &c., are seconded from the municipal police to serve under the court, and one of their number serves as registrar. The municipal police have the right to initiate prosecutions, and the Municipal Council may be represented by counsel whenever the interest of the Settlement is involved. Foreign lawyers may appear in all cases in which a foreigner is concerned, to represent the foreigner. Warrants must be signed by a judge of the court, and executed by the judicial police. All persons arrested must be brought before the court within twenty-four hours, and no person may be handed over to Chinese authorities outside the Settlement without a preliminary hearing at which he may be represented by counsel. In the case, however, of requests emanating from other modern courts outside the Settlement, the accused is handed over merely on establishment of identity.

In the first two decades of the Settlement's existence questions of jurisdiction were in a very fluid state: the British Consul contemplated punishing foreign nationals for breach of Settlement regulations; the British and American Consuls assumed jurisdiction over Chinese offenders; Treaty Consuls assumed jurisdiction over non-Treaty Power nationals; and "Yamen runners" armed with Chinese warrants freely entered the Settlement to arrest offenders and take them before the Chinese courts outside the Settlement. These warrants were the source of many abuses. In many cases they were issued by corrupt magistrates for purposes of extortion, and were sold by rascally "runners" to still more rascally substitutes. Fictitious warrants were not uncommon. On the development of municipal institutions, and especially on the establishment of the Settlement police force, some remedy for these evils had to be found. It was therefore agreed that warrants to be employed in the Settlement should be authenticated by the seal and signature of the consul, and that the municipal police should prevent the execution of any warrant not so authenticated. In practice, if a warrant was issued for a purpose that the Settlement authorities considered to be improper, its execution was obstructed. After the establishment of the Mixed Court in 1864 the offender when arrested was taken in the first instance before the court. Then, from verifying the authenticity of the warrant, it was but a short step to insisting on prima facie proof of the commission of some crime outside the Settlement.

The question of warrants is closely connected with the question of the right of the Chinese authorities to levy taxes on Chinese residents in the Settlement. In China revenue is derived almost entirely from indirect taxation such as customs duties, transport dues, and taxes on land, salt, &c., and it is only in the last few years that attempts have been made to set up administrative machinery for the collection of direct taxation. Seventy years ago attempts to collect direct taxation, especially by means of warrants entrusted to Yamen runners, were not unnaturally regarded as a species of extortion which the Settlement authorities were greatly concerned to check. In theory, the right of the Chinese Government to tax its nationals residing in the Settlement was unassailable. But in practice, if the right were freely exercised through the medium of a horde of Yamen runners, the peaceful and orderly administration of the Settlement would become impossible. In the agreement of September 25, 1863, setting aside a settlement for Americans in Hongkew, the Taotai definitely abandoned the right of the Chinese authorities to levy taxes on Chinese residents in the Settlement. In subsequent years, however, much trouble arose from the swarms of "runners" operating in the Settlement to collect dues on commodities of various kinds, and it was not until about 1900 that the Chinese authorities definitely accepted the contention of the Municipal Council that such activities were illegal and rendered the "runners" liable to punishment in the Mixed Court. The only Chinese taxes that could legally be levied in the Settlement were customs dues and land tax, and none of the 130 national and local tax offices established in the adjacent native city could operate in the Settlement. Since the reforms in the Chinese administration effected on the establishment of the present National Government in 1928, agreements have been made under which a stamp-tax law and tobacco-tax regulations are enforced in the Settlement through the agency of the municipal police against persons under Chinese jurisdiction.

The principle lying at the root of the developments described above was that the administration of the Settlement could only successfully be carried on if it was recognized that only one set of administrative officials could be allowed to function in the area in question. In the early days Chinese administration was largely non-existent, and difficulties therefore only arose in connexion with the execution of warrants and the taxation of Chinese residents. In recent years China has endeavoured to meet the needs of a country that is rapidly becoming industrialized and in general adopting western ways of life and has made considerable progress in the modernization of the machinery of government. In consequence there are now established in Chinese territory adjoining the Settlement various bureaux such as the Social Affairs Bureau (which deals *inter alia* with the relations between employers and workmen, the settlement of strikes, &c.), or those controlling educational matters, or charged with the enforcement of factory legislation, &c., all of which endeavour to extend their activities into the Settlement. The Municipal Council resists these attempts, but is handicapped by the fact that, owing to the difficulty of amending the Land Regulations and by-laws, the Council is not well equipped for dealing with a number of matters which, in the interests of the large Chinese population in the Settlement, urgently stand in need of regulation.

In consequence of the congestion caused by the influx of Chinese in 1861 and 1862 referred to above, certain foreign residents purchased land outside the Settlement and constructed a Driving Course (now the Bubbling Well Road). In 1866 the Municipal Council consented to take over this road, and in order to regularize the position an article (Article 6) was inserted in the new Land Regulations, then under consideration, giving the Settlement authorities power to acquire land "leading or being out of the Settlement" for the purpose of constructing roads, parks, &c. Thus originated one of Shanghai's most characteristic problems, that of the extra-Settlement or external roads. Municipal police were placed upon the roads acquired by the Council under Article 6 for the purpose of controlling traffic and preventing damage. As foreign residences were built on these roads police activities were gradually extended and police stations established; the activities of the Public Health Department—scavenging, draining, lighting, &c.—were also extended to these roads until in the course of time they came as completely under the control of the Municipal Council as the Settlement itself. The difficulty of collecting contributions from residents on these roads towards the cost of municipal services was solved by arranging that water, light, and telephones could only be supplied to residents who had agreed to pay the municipal rate. In the case of Chinese residents these rates were paid by the landlord, and this arrangement was recognized by the Taotai in a proclamation issued by him in 1906. After this date, however, the Chinese began setting up municipal institutions in most of the big cities of China and opposition then developed to the extra-Settlement activities of the Shanghai Municipal Council. The extension of the Settlement in 1899 left over 4 miles of municipal roads beyond the new boundaries. In 1901 this had increased to 17 miles and in 1918 to 29 miles. In 1924, while Shanghai was involved in a civil war, the Council bought land for new roads as much as 15 miles from the river front. The total mileage was thus increased to 48 miles. But after this the opposition to the Council's extra-Settlement activities came to a head and strenuous efforts were made by the Chinese to prevent further encroachment and to recover control of the areas in question. In 1927 a Chinese municipality was established for Greater Shanghai and claimed that the whole of the external roads area lay within its jurisdiction. Considerable difficulty has since been experienced by the Council in scavenging, cleaning, and carrying out the necessary maintenance work on these roads. There has been some risk of collision between rival police forces, and the public utility companies—power, water, and telephones—are also involved in the controversy. Since 1930 negotiations have been carried on with a view to reaching a *modus vivendi* on the basis that a special police force containing a foreign element but under the control of the Chinese Municipality should be established for the policing of the external roads area, while power to maintain the roads and establish health and other services should be delegated by the Chinese Municipality to the Settlement authorities. The difficulty of reconciling the conflicting views of the Chinese and Japanese has, however, prevented any agreement being reached.

The area of the original British Settlement was 138 acres. This was enlarged by agreement in 1849 to 470 acres, and by amalgamation with the American Settlement in 1863 to 1,779 acres. A further and final extension of the Settlement in 1899 increased its area to 5,583 acres. The external roads encompass an area of about 8,000 acres, but not all of this area can now be said to be under even quasi foreign administration. The original British settlement became an International Settlement because nationals of other powers could take up land in the Settlement, and the only method of securing observance by them of the Land Regulations was by admitting these powers to equal participation in the privileges of the Settlement.

At other Treaty ports such as Tientsin and Hankow a different method was adopted. The Chinese Government expropriated the Chinese owners of the site and granted a lease in perpetuity of the whole area to the British Government, who in turn granted crown leases for 99 years to merchants desiring to take up lots. If the merchant were a foreign national he had to enter into an undertaking endorsed by his consul to observe the Land Regulations. Where, as at Shanghai, the foreign merchant acquired the land direct from the native owner the site was a Settlement, but when there was a grant from government to government it was a concession. The French at Shanghai, however, successfully maintained the position that they had been granted by the Chinese Government "la plénitude des pouvoirs administratifs en matière municipale". They therefore called their site a concession and placed it under the autocratic rule of the French Consul. Its juridical basis, however, is exactly the same as that of the International Settlement.

The developments in the International Settlement in regard to Settlement extension, external roads, Mixed Court, execution of warrants, and Chinese representation have all had their counterpart in the French Concession, but the autocratic régime under which the latter has been administered has at least had this advantage: that political agitation over these questions has in the main been confined to the International Settlement. The area for the French Concession was originally 164 acres and by successive extensions granted in 1861, 1900, and 1914 this has been enlarged to 2,525 acres. The last extension absorbed all the external roads constructed by the French Municipality. A Mixed Court was established in the French Concession in 1869. The Chinese magistrate was chosen by agreement between the French Consul-General and the Taotai and except in purely Chinese civil or criminal cases sat with a French assessor who to an even greater extent than the corresponding official in the International Settlement exercised the powers of a co-judge. In 1931 the French Mixed Court was abolished and a District Court and a branch High Court were established in the French Concession in place thereof. The agreement followed very closely the lines of the agreement relating to the courts in the International Settlement signed in the previous year.

The règlement of 1868 provided that one or more Chinese might be appointed by the Consul-General and the Taotai as advisory members (i.e. without a vote) of the French Municipal Council, but this remained a dead letter until after the extension of the French Concession in 1914. Two Chinese were then appointed to discuss with the French Municipal Council questions concerning Chinese residents in the French Concession. The number was subsequently increased; five Chinese now sit on the Commission Provisoire d'Administration which has taken the place of the Municipal Council.

The International Settlement, unlike the French Concession, is administered by an elected Council of 14—nine foreigners and five Chinese—whose actions are not subject to the control or veto of any national government. For some years past there has been a tacit understanding that the nine foreign seats should be filled by five British subjects, two Americans, and two Japanese. An attempt by the Japanese to secure a third seat was heavily defeated in 1936. Persons qualified to vote in the election of councillors and at meetings of ratepayers are foreigners who (*a*) own land not less than 500 taels (£75) in value and pay an annual assessment of not less than 10 taels (£1 10*s*.), or (*b*) are householders paying on an assessed rental of not less than 500 taels per annum. On the principle "one interest one vote" a large real estate company would possess but one vote, but one ratepayer may possess extra voting tickets in respect of distinct interests represented by him. Under this system out of a foreign population of 28,000 there are less than 2,500 voters. The British have the greatest number of votes and the administration is overwhelmingly British both in character and personnel. The chief officers of the Administration are the Secretary General, Secretary, Treasurer, and Chief of the Fire Brigade; the Commissioners of Police, Public Health, and Public Works; the Superintendent of Education, the Press Officer, the Municipal Advocate, and finally the Commandant of Volunteers who is always a Colonel on the active list lent to the Council by the British War Office. The work of the Council is carried out by a number of committees constituted each year for finance, watch, works, staff, public utilities, health, orchestra, library, rate assessment, and ricshas. There are also an Education Board and a Board of Film Censors.

The ordinary income of the International Settlement for the year 1936 amounted to just over \$24½ millions (over £1½ millions) and the main items of expenditure were:

	\$
Education	2,367,500
Volunteer corps	690,140
Fire Brigade	1,149,570
Police and gaols	9,901,640
Health Department	2,106,620
Public Works Department	5,372,490

The revenues of the French Concession for the year 1935 amounted to \$9,690,604 (over £600,000) and the main items of expenditure were:

	\$
Police	3,109,345
Public Works	1,833,058
Education	582,246
Public Health	450,110

This brief account may be fittingly brought to a close with some comparative statistics of population from the census taken in the International Settlement in 1935 and in the French Concession in 1934:

	International Settlement	*External Roads*	*French Concession*	*Total*
Chinese	1,120,860	?	479,294	1,600,154
Foreign	28,583	10,332	18,235	57,170

The foreign population comprises 42 nationalities including:

American	1,494	523	1,792	3,809
British	7,167	2,069	2,689	11,925
French	158	54	1,430	1,642
Japanese	14,184	6,058	280	20,522
Russian	2,582	435	8,260	11,277

CONFLICTS OF JURISDICTION IN MATRIMONIAL SUITS

By H. C. GUTTERIDGE, K.C., LL.D.; Fellow of Trinity Hall and Professor of Comparative Law in the University of Cambridge

So much has been written on the vexed question of conflicts of jurisdiction in proceedings for divorce[1] or separation that it may seem to be both unnecessary and presumptuous to seek to add to the great volume of literature which already exists on this subject.[2] There are, however, certain considerations which appear to indicate that it may not be altogether inopportune to reopen the discussion and to examine the matter once again in the light of recent events. Chief among these is the fact that The Hague Convention of June 12, 1902, on conflicts of jurisdiction in matters of divorce and separation must be considered to have failed to achieve its object. Successive denunciations of the convention by France, Belgium, Switzerland, Germany, and Sweden have reduced the number of signatory states to eight, thus depriving the convention almost entirely of any claim to furnish an international solution of the question. The failure of the convention is further emphasized by a growing tendency to deal with the problem by means of bi-lateral or multi-lateral conventions. But that the question cannot be regarded as moribund is shown by the resolutions passed at the Oxford Session of the International Law Association, 1932,[3] in favour of renewed international action in the matter, and by the recent decision of the Institut de Droit International to restore the topic to its agenda for study and report.[4]

The uncertainty and confusion which characterize the rules of private international law dealing with the matter are primarily due to the fact that each national system of law deals with the question in accordance with the *lex fori*, modified in certain instances by the provisions of such international conventions as have been entered into. Each system of law applies its own doctrines as to the bases of competence, and the conflict between these doctrines gives rise to innumerable hardships to individuals and in many cases creates for them insuperable difficulties.[1]

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[1] i.e. divorce *a vinculo*. Space does not permit of the discussion of the problems presented by conflicts of jurisdiction in the case of nullity suits.

[2] Bibliographies which furnish references to most, though not all, of the numerous treatises and articles on this subject are to be found in Lapradelle-Niboyet, *Répertoire de droit international*, Vol. V, Title II, Ch. 5, pp. 555–63 (Divorce et séparation de corps); in Schlegelberger, *Rechtsvergleichendes Handwörterbuch*, Vol. IV, sub-tit. Internationales Privatrecht, Vol. IV, pp. 413–14; Gutzwiller, *Internationalprivatrecht*, and in Stammler, *Das gesamte deutsche Recht*, p. 1640.

[3] *Report of the 37th Conference of the International Law Association* (1933), pp. 65 *et seq.*

[4] *Annuaire de l'Institut de Droit International*, Vol. XXXIX (1936), Part II, p. 357.

The problem which is presented by these conflicts of jurisdiction is admittedly one of the most delicate and difficult to be found in the whole range of private international law because it touches at so many points on national or religious sentiment with regard to the marriage tie and the obligations which flow from it. A further complication arises from the fact that the question coincides to a considerable extent with another equally delicate and difficult problem of the same nature, namely, the conflict of laws relating to the grounds upon which divorce or separation is admissible. On principle, these two questions should, no doubt, be kept distinct, and technically it would be quite feasible to do so in the present instance. But the results which would be achieved by an inquiry which would be directed solely to the rules regarding competence, thus rigidly excluding any investigation into the effect of conflicts of the rules governing the grounds for divorce or separation, must necessarily be of an unsatisfactory character. In many countries the courts will decline to exercise their jurisdiction in a case containing a foreign element unless it is clear that the decree which they may pronounce would be recognized by the courts of any other country which may also claim to be competent in the matter. The German courts, for instance, cannot pronounce any decree of divorce which the courts of the country of which the husband is a national could not have pronounced.[2] Where the right to a divorce is denied on this ground the consequences are in practice equivalent to those resulting from the absence of competence, because it is immaterial to the spouses in such cases whether the relief which they seek is refused owing to the incompetence of the court to which they have had recourse or because a competence which exists is paralysed by a conflict between the rules of two systems of law with regard to the grounds of divorce. If it is our object to seek for a remedy for the grievances which are created by the existing state of the rules of private international law which deal with the right to a divorce or a separation, it would surely be idle from a practical point of view to confine our investigation to the rules of competence and to ignore rules of law which have precisely the same result. The rules of competence must, of course, be the primary object of our inquiry, but to exclude the wider aspect of the problem altogether would be to incur the risk of arriving at a result which would either be of very little value or perhaps even of no value at all. For these reasons it is hoped that no objection will be taken to the introduction into the discussion, so far as may be necessary, of such rules as bear not only on the question whether in given circumstances a court is to be deemed to be competent, but also on the further question whether the court, if competent, will exercise its jurisdiction in those circumstances.

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[1] *Annuaire de l'Institut de Droit International*, Vol. XXXIX (1936), Part II, Report of the International Law Association at p. 66.

[2] See *Einführungsgesetz B.G.B.* Article 17; *Zivil-Prozess Ordnung*, Article 606 (4).

The early attempts to unify the rules of competence

The narrative of the efforts which have been made in the past to find a solution of the problem created by these conflicts of jurisdiction is not one which is calculated to inspire any feelings of undue optimism. It is for the most part a record of failure, though it possesses, none the less, considerable value in so far as it serves to mark the various obstacles which must be overcome in the search for uniformity. So far as unification on a world-wide scale is concerned, it begins in 1888 with the resolutions which were adopted at the Lausanne Session of the Institut de Droit International: so far as regional unification is in question, it dates from the Congress of Lima in 1878.

The resolutions adopted at Lausanne in 1888 were of a general character and the questions involved were not debated at length or in detail. Their importance lies in the fact that they represent the first attempt to arrive at an international solution of the problem and that they are based on the national jurisdiction of the spouses.[1] The impetus thus given to the study of the problem resulted in the shifting of the scene to The Hague and the assumption by a diplomatic conference of the task of drafting a convention for submission to the various governments which were represented at the conference. The work was begun in 1894 and culminated in the convention of June 12, 1902, on conflicts of jurisdiction in matters of divorce and separation.

The convention undeniably represents a definite step in advance, but it was never more, in the international sense, than a partial solution of the problem, owing to the abstention of the Anglo-Saxon countries and certain other states. Moreover, as was proved by the subsequent fate of the convention, it did not deal with certain important questions which were latent in the problem but were destined to come to light as soon as a sufficient time had elapsed to gain experience of the operation in practice of the rules laid down in the convention. The conference adopted the principle that jurisdiction resulted from the nationality of the spouses more or less as a matter of course, in the belief that this solution was calculated to solve any questions which might arise in the future—a belief destined to be falsified in a somewhat striking manner thereafter. The tacit assumption appears to have been that husband and wife would always be of the same nationality, and in this assumption were concealed the germs of future discord.

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[1] *Annuaire de l'Institut de Droit International*, Vol. X (1888–9), Session de Lausanne, pp. 64, 66–7, and 78–9.

The number of signatory states[1] was considerable in the first instance, but the convention was denounced by France in 1916, by Belgium in 1918, by Switzerland in 1929, and by Sweden and Germany in 1933. The motives of these denunciations will be referred to hereafter when we consider the detailed provisions of the convention, and it will suffice for the present to observe that at the moment of writing the convention is only in force as between an attenuated group of states, i.e. Danzig, Hungary, Italy, Luxemburg, the Netherlands, Poland, Portugal, and Roumania. At the adjourned meetings of The Hague Conference held in 1925 and 1928 an effort was made to amend the convention in such a way as to meet the objections which had been raised and to stave off the threats of denunciation, but these attempts were abortive, and as matters now stand it is not possible to treat the convention as being more than the achievement of a stage on the road towards unification.

Running parallel to this effort to secure unification on a world-wide scale was a movement to secure regional uniformity among the Latin-American republics. The Convention of Lima, 1878, was the first of the multi-lateral treaties to deal with the relations between husband and wife. It was superseded in 1889 by the Convention of Montevideo and in 1928 by the Code Bustamante. The majority of the Latin-American republics have ratified the Code Bustamante and have modified their internal laws to conform to it. The position is, however, not altogether clear, owing to the fact that, although jurisdiction is based, according to Article 318 of the Code, on the matrimonial domicil, certain concessions had to be made to those states which prohibit divorce and only allow separation.[1] In other words, it is more than doubtful whether anything in the nature of complete uniformity of rule has been achieved.[2] A more successful instance of a regional solution of the problem is to be found in the Stockholm Convention of 1931 between Denmark, Finland, Iceland, Norway, and Sweden. We shall have occasion hereafter to examine the terms of this convention, which, somewhat significantly, is based on the jurisdiction of the courts of the domicil, with the jurisdiction of the national courts as a subsidiary element.

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[1] Belgium, France, Germany, Hungary, Italy, Luxemburg, The Netherlands, Portugal, Roumania, Sweden, and Switzerland. Poland and Danzig became signatories at a later date.

The work done by the International Law Association also calls for notice. It has extended over a lengthy period and its most valuable achievement has been the collection of much useful information as to the rules of competence which prevail in the different countries.[3] This information was obtained by the circulation of a questionnaire and by a patient but determined insistence on replies to the questions which it contained. In 1932 a committee appointed by the Association and composed of representatives both of the Anglo-Saxon and the continental systems of law drew up a report which advocated the concurrence of the jurisdictions of the domicil and of the nationality. This report was adopted by the Oxford Conference, but its importance lies rather in the fact that it represents the views of the legal profession in Great Britain and the United States than in any contribution which it makes to the scientific discussion of the problem. It does not probe into the question very deeply, and the discussion which preceded the adoption of the report was of a somewhat desultory character. In any case, it did not purport to be more than a *ballon d'essai* intended to serve as a test of international opinion on the matter.

The above narrative is largely one of failure to achieve positive results, but the lesson to be learnt from it is that the problem is a formidable one. The endeavour to secure international co-operation in a delicate matter of this nature must inevitably be protracted and fraught with disappointment. The problem of unification is difficult enough in a field in which the issues involved have no interest other than of a purely materialistic character. How much more difficult must it not then be to secure agreement concerning matters which touch family sentiment and the religious beliefs of mankind? This does not necessarily mean that the problem defies solution, but it emphasizes the need for a careful approach to the issues at stake and a detailed analysis of the difficulties which lie in the way.

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[1] Divorce is forbidden by the civil codes of the Argentine Republic, Bolivia, Brazil, Chile, Colombia, Paraguay, and Peru.

[2] See Chéron, *Les Causes de divorce et de séparation de corps en droit international privé comparé*, Part II, Ch. 2, Section II.

[3] See *Jurisdiction and Recognition in Divorce and Nullity Decrees.* Edited by William Latey (1933). Sweet & Maxwell, London.

The basis of competence

A detailed comparative study of all the differences which exist between the rules of competence of the various countries would not only be beyond the scope of this article but would, in fact, be superfluous, as the matter has been dealt with very fully elsewhere.[1] It is, however, necessary to consider in a general way the grounds upon which a court may declare itself to be competent in a suit for divorce or separation, because it is only thus that it is possible to appreciate the circumstances in which a conflict of jurisdictions may arise.

Theoretically, competence in a suit for divorce could be based either on the domicil or the nationality of the parties or on the *lex loci celebrationis*. The last-mentioned ground of competence hardly seems to be one which enters very profoundly into the matter, though it has received a certain amount of support, for instance, in the resolutions passed by the International Law Association at Oxford in 1932.[2] It is argued that because the courts of the place of celebration of a marriage are competent to pronounce upon the validity or otherwise of the marriage they should also be competent to dissolve it. This does not, however, seem to be an argument which carries conviction with it. The place of a marriage, more particularly when the parties have different nationalities or domicils, is often accidental and is selected purely for reasons of convenience or the like, so that it has no connexion either with the everyday life of the spouses before their marriage or with the matrimonial home which it is proposed to establish thereafter. Moreover, it would seem to be wrong in principle to base competence on this ground, because the reasons which lead to the selection of the *locus celebrationis* as the forum to determine the validity in form of a marriage have no bearing on the questions which arise in a suit for divorce or separation. Competence to do an act, and consequently to determine its validity, does not logically entail competence for an *actus contrarius*. In substance, therefore, we are only concerned with the rival claims of the courts of the domicil and the courts of the nationality.

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[1] See Lapradelle-Niboyet, *Répertoire de droit international*, Vol. V (Divorce et séparation de corps); Leske-Loewenfeld, *Das Eherecht der europäischen Staaten und ihrer Kolonien*; Schlegelberger, *Rechtsvergleichendes Handwörterbuch*, Vol. IV, sub-tit. Internationales Privatrecht; Audinet, "Les Conflits de lois en matière de mariage et divorce", *Recueil des cours de l'Académie de Droit International*, 1926, Vol. I, p. 171; Richard-Prassinos, *Le Divorce et la séparation de corps en droit comparé et en droit international privé*; Valladao, *Conflicto das Leis Nacionales dos Conjuges*; Kuhn, *Comparative Commentaries on Private International Law*.

[2] See also Article 13 of the Convention of Montevideo.

Domicil as a ground of competence

The domicil may be that of both the spouses or that of the husband or that of the wife (where desertion has taken place), or that of the party who is the respondent in the suit for divorce or separation.[1] There is no agreement internationally on this or the other circumstances which must exist in order to establish the existence of a domicil. It is sometimes the creation, as in the Anglo-Saxon systems of law, of highly detailed and technical rules; on the other hand, in some countries it is little more than a form of habitual residence. All attempts to secure unanimity on the nature of domicil have hitherto proved to be unavailing,[2] but domicil in the present context would seem to mean the matrimonial domicil, i.e. the locality in which the spouses have definitely fixed the matrimonial home.

There are many considerations which lend support to the view that competence in matters of divorce and separation should be attributed to the domicil. Continued residence in a community establishes a presumption that the resident has attracted to himself the law of the community in which he has made his home and that it is by this law that he intends his personal relationships, including those between himself and his wife, to be governed. The corollary to this proposition is that the community is entitled to assume jurisdiction in respect of such relationships. At all events, this is a view of the matter which is widely held. It prevails in the Anglo-Saxon countries, in Norway and Denmark, and also finds strong support in France and certain of the South American countries. But it has had to give way in most countries to the principle of the predominance of the national law of the spouses.[1]

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[1] In Scotland it may be the domicil of the husband at the date of the marriage and of the commission of the matrimonial offence in respect of which the divorce is claimed. Gloag, *Introduction to the Law of Scotland*, p. 18.

[2] See the report of the debate at the Cambridge Session of the Institut de Droit International. *Annuaire* (1931), Part I, pp. 492–513; Part II, pp. 178–97.

The arguments against the adoption of domicil as the criterion of competence are founded rather on the difficulties which arise when it comes to be applied in practice than on any inherent defects which it may be said to possess on theoretical grounds. It is said, with considerable justice, that the concept of domicil is too vague to be satisfactory as a criterion: that the differences which exist, for instance, between the "*domicil*" of Anglo-American law, the "*Wohnsitz*" of German law, and the "*domicile*" of the Latin countries are so great as to make it impossible to base competence on this ground. It is also pointed out that the rule by which a wife takes the domicil of her husband is apt in practice to lead to unfortunate consequences when the husband deserts the matrimonial home and proceeds to another country.[2] Another objection, which is not, however, peculiar to the notion of domicil, is that a person may in certain systems of law, other than the Anglo-Saxon systems, either have more than one domicil or no domicil at all.

These arguments carry great weight, but the problems which they indicate do not appear to be impossible of solution. There does not seem to be any reason why the notion of domicil should not, for the limited purpose of fixing competence in suits for divorce or separation, be defined internationally. This, however, is a matter to which we shall return hereafter when discussing the general question of the possibility of the unification of the rules of competence. It may, perhaps, be observed in conclusion that if world-wide unification is aimed at it would seem to be essential that domicil should be taken as the criterion, for reasons which will be stated when we consider the next criterion, i.e. the nationality of the parties.

Nationality as a ground of competence

The view that the spouses should always be entitled to resort to their national courts for relief from their matrimonial troubles is the one which is generally held elsewhere than in the Anglo-Saxon countries. It rests, broadly speaking, on the supposition that an individual must always be entitled to the protection of his national courts in the event of any question arising which affects his status. It is also supported by the argument that the criterion of nationality is free from the uncertainty which characterizes the test of domicil. It was adopted tacitly as the basic principle of The Hague Convention of 1902, and it would be idle to deny that it has secured a firm hold both in the jurisprudence and the doctrine of almost all the continental countries.

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[1] The phrase "national law" is employed here, not in its strict sense, but as including the situation which arises if a state declines to recognize the divorce of its citizens or subjects in any circumstances.

[2] This is no longer the case so far as English law is concerned (Matrimonial Causes Act, 1937, sect. 13). As to the position in the United States, see Kuhn, *op. cit.*, p. 162 *passim.*

Nevertheless, the principle of nationality is also open to certain objections if it is to be treated as the sole criterion of competence. In the type of case in which there is a conflict of jurisdictions the nationality either of one or both of the parties is often an element of minor importance, as, for instance, where the person in question has either never resided in the country of his or her nationality or has been absent from it for a prolonged period. It may also be necessary to choose between the nationality of the husband and that of the wife owing to the increasing tendency to allow a wife to retain her nationality on marriage and to relax the rule that a wife always assumes the nationality of her husband. It also gives rise to difficulties in such cases as those of persons of no nationality or more than one nationality. But perhaps the most cogent argument against the adoption of nationality as an exclusive criterion is that this would inevitably lead to the abstention of the Anglo-Saxon countries from any scheme of unified rules. Although British and American nationality exist in the political sense, there is no such thing in the private international law sense of the word. Canadians and citizens of the State of California are not governed respectively by British or American law but by the law of Canada or California. Canada and California are jurisdictions independent of other British or American jurisdictions. So that it is an empty phrase to speak of the competence of the national courts when dealing with subjects or citizens of the British Empire and the United States of America. We may therefore conclude that although the criterion of nationality is attractive in so far as it avoids many of the difficulties which are encountered in the case of competence based on domicil, it is nevertheless unsuitable, standing by itself, as a foundation upon which to erect a system of unified rules. It may be argued, perhaps, that it should be possible to frame a special definition of nationality so as to meet the requirements of the particular case with which we are dealing. But to attempt to do so would stir up latent political controversies and would seem to be foredoomed to failure at the present time.

In any event the task of endeavouring to secure the assent not only of the forty-eight states of the United States but also of the British Dominions to a change of this nature is of so formidable a character that it would seriously jeopardize the success of any movement for unification.

The causes of conflicts of jurisdiction

Where husband and wife are both of the same nationality and are domiciled in the national territory it is obvious that no question of conflict can arise. But it is not uncommon to find that a "foreign element", to use Dicey's phrase, is introduced into divorce proceedings at the present day. Both or one of the parties may be of foreign nationality or may not be domiciled within the territory of the court from which redress is sought. In such cases it may happen that each of the two jurisdictions concerned claims to be solely competent in the matter and refuses to recognize the extra-territorial validity of any decree pronounced by the other. Such conflicts may not only be positive but also negative, in which event the unfortunate parties may find themselves debarred from all possibility of relief. These negative conflicts arise where the national law of the parties rejects the institution of divorce *in toto* and the forum of the domicil declines to entertain any proceedings unless its decree will be valid by the national law of the other party. It is this last type of conflict which has been largely responsible for the wrecking of The Hague Convention of 1902.

The causes giving rise to these conflicts of jurisdiction may, perhaps, be grouped for the sake of clarity and convenience in the following way:

A. One of the principal causes of conflict is a claim to exclusive jurisdiction either by the courts of the domicil or by those of the nationality. The law of the Anglo-Saxon countries, for instance, bases competence exclusively on the domicil of the parties[1] and declines to recognize any other jurisdiction. Certain other countries[2] claim the exclusive right to divorce their nationals.

B. The refusal of certain countries to allow their nationals to be divorced in any circumstances should, it is submitted, also be regarded as an instance of the conflict of jurisdictions. This is the attitude adopted by Italy, the Irish Free State, Quebec, Argentina, Bolivia, Brazil, Chile, and Colombia. In such countries *séparation de corps* is the only remedy, and divorces granted to nationals of the country by courts of a foreign domicil are not recognized. Other countries (e.g. Austria) adopt a similar attitude, but only in the case of their nationals who profess the Catholic faith.[1]

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[1] This is not necessarily the domicil of the husband. The law of the United States recognizes the existence of a separate domicil of a wife who has been wilfully deserted by her husband, and English law is to the same effect since the recent legislation on divorce (Matrimonial Causes Act, 1937, sect. 13).

[2] e.g. Czechoslovakia, Hungary, Lithuania. In the case of Austrian citizens the position is not clear.

Such cases are, strictly speaking, instances of a conflict of laws rather than of a conflict of jurisdiction. Where, as in England, the courts of the domicil pay no heed to the national law of the parties the question of jurisdiction does not arise. But where the *lex fori*, as in Germany or Switzerland, declares its competence to be conditional on the recognition of its decree by the national law of the parties, the effect is the same as that of a conflict of jurisdictions, because it amounts in practice to the attribution of an exclusive jurisdiction to the courts of the nationality in all cases in which the *lex patriae* prohibits divorce.

C. A similar state of affairs exists when the court of the domicil declines to entertain a suit for divorce or separation because the ground on which a decree is claimed, though valid according to the *lex fori*, is not admitted by the *lex patriae*. Here again the result in effect is to reserve an exclusive jurisdiction to the courts of the nationality.

D. Other matters which fall under the heading of conflicts of jurisdiction are the problems which are encountered when the parties are of double nationality or no nationality, or where one or other of the parties has changed his or her nationality or domicil either after the occurrence of the event which constitutes the ground for divorce or separation or after the institution of the proceedings to obtain a decree.

E. Finally, there is the problem presented by the conflict which may occur, as in the famous *Affaire Levinçon*,[2] between the courts of the domicil of the parties and the ecclesiastical tribunals established by the religious law of the parties. How far this question is of practical importance at the present day is a matter of doubt, but it has been fruitful of controversy. For the purpose of the present discussion it would seem to be merged in the question already alluded to of a claim by a state to exclusive jurisdiction over its nationals or over such of its nationals as profess a particular religion.

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[1] A somewhat similar situation arises when, as in China, divorce proceedings can only be instituted by the husband. See the case mentioned in the *Bulletin Trimestriel de l'Institut Belge de Droit Comparé* (1923), at p. 146, and the comments thereon of M. Jofe, *ibid.* (1937), at p. 131.

[2] Sirey, 1906, 1. 161; *Revue de droit international privé* (1905), p. 518; Clunet, 1905, p. 1006.

The above attempt to analyse the causes of conflict is, perhaps, imperfect, but it is hoped that it may serve to illustrate the complexity of the problem and the very delicate issues which it raises.

The obstacles to a settlement of these conflicts by international agreement appear, in substance, to be threefold. The first and most serious of these is the claim to exclusive jurisdiction either by the courts of the domicil or of the nationality. Next, hardly less important, is the refusal of certain countries to recognize the divorce of their nationals, and finally there is the situation which arises when the courts of the domicil refuse to assume jurisdiction in cases in which a decree would not be recognized by the *lex patriae* of the spouses.

Whether it is possible to overcome these obstacles and, if so, by what means, will form the next stage of our inquiry. This is a matter which must be considered in the light of the attempts which have been made in the past to solve the problem.

The system of The Hague Convention

The Hague Convention of 1902 represents an attempt to secure unification of the rules of competence in matters of divorce and separation within the circle represented by countries other than the Anglo-Saxon countries. The United States and Great Britain declined the invitation to participate in the conference on the ground that the differences between the rules of Anglo-American law and those of the continent of Europe were of such a character as to negative any possibility of unification.

Taken as a whole, the convention marks a distinct step in advance. It was based on a concurrence of the jurisdictions of the domicil and of the nationality which appeared to furnish the only way out of the difficulty, having regard to the gulf which had to be closed between the various systems of law which were represented at the conference. Unfortunately, the solution thus arrived at was restricted in its operation by the terms of Articles 1 and 2 of the convention, which debarred spouses who are foreigners from instituting proceedings in the court of their domicil if their national law forbids divorce or separation or if the ground upon which the divorce or separation is claimed is not recognized by their national law. The result of this limitation did not become apparent until some time had elapsed, when it was found that it operated in conjunction with Article 8 of the convention to deprive the so-called *réintégrées*[1] of their right to claim a divorce from their national courts. Article 8 provides that where the spouses are of different nationality their national law shall be considered to be the law of their last common nationality. The joint effect of Articles 1, 2, and 8 may be illustrated by the situation which resulted in the denunciation of the convention in 1929 by Switzerland. A Swiss woman who married an Italian and so acquired Italian nationality sometimes obtained a decree of *séparation de corps*—which was the only remedy open to her by Italian law—from an Italian court and returned to her own country, where she was re-admitted to Swiss nationality. When she took steps under the Swiss Civil Code to convert the separation into a divorce, the Swiss courts found themselves unable to entertain the suit because the woman's right to a divorce depended, in accordance with Article 1 of The Hague Convention, on her national law. As she and her husband were of different nationalities this national law, by virtue of Article 8 of the convention, was not Swiss law, but the law of their last common nationality (viz. Italian), and the Swiss courts were debarred from granting relief. The unhappy position in which such women found themselves stirred public opinion, and in 1929 The Hague Convention was denounced for this reason by Switzerland. In 1933 it was denounced on the same ground first by Sweden and then by the German Reich.[2] The motives of withdrawal are very clearly stated in the note of November 3, 1933[3] which accompanied the Swedish denunciation:

> "Aux termes de la Convention dont il s'agit, une demande en divorce ne peut être formée que si la loi des époux admet le divorce en général et l'admet pour la cause invoquée par l'intéressé (Arts. 1 et 2), et si les époux n'ont pas la même nationalité leur dernière législation doit être considérée à cet égard comme leur loi nationale.
>
> "Comme les délégués suédois aux deux dernières sessions de la Conférence de la Haye de droit international privé ont déclaré au cours de la discussion d'une proposition émanant de la délégation suisse et ayant trait à cette question, ces dispositions produisent, dans bien des cas, des effets qui blessent le sentiment public suédois."[4]

The attempt made by The Hague Conference of 1928 to amend the convention took the form of the redrafting of Article 8 to meet those cases in which a wife may either not lose her nationality on marriage or may be reintegrated in her former nationality after the marriage. The article in its new form provided that where one of the spouses changes his or her nationality after marriage the law applicable shall be that of the *dernière législation commune.* Where the spouses were never of the same nationality or have each acquired a different nationality after marriage the divorce must be admitted by the national law of both parties. Two protocols were also drafted, the effect of which was to enable any state, notwithstanding the provisions of the convention, to reserve the right to decide whether a woman national of the state may be divorced by the national courts even if she is married to a foreigner whose national law does not recognize the right to a divorce in the particular circumstances of the case. Two limitations were, however, placed on this right of reservation, i.e. it must be shown that the woman has retained or regained her nationality of origin and has her habitual residence in the territory of the state. It was also provided in the protocols that the state of the husband's nationality should not be bound to recognize any decree of divorce granted in pursuance of the right reserved by the protocols. These alterations to the text did not meet with general assent and the attempt to rehabilitate the convention must be deemed to have failed.

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[1] i.e. women who have married a foreigner and, after being separated from him judicially, regain their original nationality.

[2] *Zeitschrift für ausländisches und internationales Privatrecht* (1934), p. 638.

[3] *Ibid.*

[4] *Ibid.*

The rules contained in The Hague Convention appear to fall short of being a satisfactory solution of the problem for several reasons. In the first place, they subordinate the right to claim a divorce or separation to the rules of the national law of the spouses. Secondly, they define that law in a somewhat artificial way in the event of a difference in the nationality of the spouses. Thirdly, they do not furnish a complete solution as they do not deal with certain questions such as the position of apatrides or persons of double nationality. There does not seem to be anything to be gained by any further attempt to resuscitate the convention, and a wiser policy would appear to be to endeavour to found any future international agreement, if possible, on a wider basis.

The Convention of Stockholm, 1931[1]

Of the Nordic countries, Sweden was alone in signing and ratifying The Hague Convention of 1902, and her withdrawal left the ground clear for action to be taken in the matter in pursuance of the general policy of co-operation which has been a feature of the legal activities of the Nordic countries since the War. In 1931 agreement was reached as to the terms on which each of these countries should recognize decrees of divorce or separation pronounced by the courts of the other countries.

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[1] *Zeitschrift für ausländisches und internationales Privatrecht* (*1934*), p. 627.

The Convention of Stockholm is based on two principles. The first is that competence normally belongs to the courts of the domicil: the second is that the right to a divorce or separation should be governed by the *lex fori*. Cases in which the spouses are not domiciled in the same locality are met by a provision that the courts of the last common domicil shall have jurisdiction if one of the spouses is still domiciled there. If the criterion of domicil is not applicable,[1] then the courts of the nationality of both or either of the spouses are declared to be competent.

This is a compromise which demands our attention, as it was arrived at between certain states which base competence on the domicil and others which give preference to the national courts. But it was arrived at in circumstances which differ widely from those which are encountered in any effort to arrive at world-wide unification. The countries involved have, to begin with, a very similar outlook on questions as to the nature of the marriage tie, and are not troubled to any serious extent by the religious and political differences which beset the world at large. Moreover, these countries are adjacent to one another, so that the obligation to resort to a jurisdiction other than that of the domicil does not involve serious hardship; furthermore, similarities of language and legal institutions create an atmosphere of mutual confidence which is, perhaps, exceptional. Nevertheless, the solution embodied in the Uniform Law furnishes some ground for the hope that a wider scheme of uniformity is not beyond the bounds of possibility.

The proposals of the International Law Association

The Conference of the International Law Association, held at Oxford in 1932, adopted a series of resolutions which in substance amount to the recommendation of a solution which would admit of concurrent jurisdiction on the part of the courts of the domicil, the courts of nationality, and the courts of the place of celebration of the marriage. These resolutions are somewhat vague in character and for reasons which have already been mentioned should not be treated as concrete proposals for the establishment of a uniform system of competence. They cannot, however, be ignored, because they represent the only attempt which has been made by Anglo-Saxon jurists to get into touch with the movement for unification. The report on which the resolutions were based was drafted by a committee which included leading members of that section of the English Bar which practises in matters of divorce, and it is also thought that it reflected current opinion in the United States of America. The resolutions are somewhat difficult to understand, owing to their vague character, but they may be taken to indicate that a certain section of opinion among the Anglo-Saxon jurists would be prepared to accept a solution which gives concurrent jurisdiction to the courts of the domicil and of the nationality, and leaves the grounds of divorce to be determined by the *lex fori*.

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[1] e.g. the law of Finland does not contain any provision enabling a decree of separation to be converted into a decree of divorce. Swedish, Danish, or Norwegian spouses domiciled in Finland must resort to their national courts in such cases.

The American Restatement of the Conflict of Laws

The rules of competence in the United States are of an extremely complicated nature owing to the existence of 48 separate jurisdictions.[1] But with few exceptions they are founded on similar principles, and the American Restatement published in 1934 purports in §§ 110–13 to give a statement of the rules generally in force, so that it is the nearest approach which can be found to an attempt to reduce the rules to a codified form. It is, of course, not a code: indeed, it has not the force of law and its authority is purely persuasive. For our purposes, it can, however, be taken to represent the present situation in the greater part of the United States.

The Restatement bases jurisdiction on the domicil of the spouses (§§ 110 and 111). This means, in general, the domicil of both of the spouses, but in certain exceptional cases a state can exercise jurisdiction if only one of the spouses is domiciled within the territory of the state (§ 113). These exceptional cases are the following: where the spouse who is not domiciled in the state has consented to the acquisition by the other spouse of a separate domicil or loses his or her right to object to the acquisition of such separate domicil by reason of misconduct; the state will also have jurisdiction where one of the spouses is domiciled within its territory if the spouse who is not so domiciled is personally subject to its jurisdiction or if it is the state of the matrimonial domicil.

Domicil in general is equivalent to residence, and the periods of residence required to constitute domicil are sometimes fixed at definite times which vary from six weeks in Nevada to three years in Connecticut.[1] The American courts will assume jurisdiction, if the test of domicil is satisfied, without regard to the question whether the grounds on which a divorce is claimed are valid according to American law or not. The conditions which prevail in the United States are such as to preclude the adoption of any basis of competence other than domicil, and the American Restatement cannot, therefore, be regarded as an effort to solve the problem as it arises elsewhere.

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[1] See these rules tabulated in Latey, *Jurisdiction and Recognition in Divorce and Nullity Decrees*, pp. 7 *et seq.* The summary of these rules by Lorenzen in the *Répertoire de Droit International*, Vol. VI, pp. 338 *et seq.*, should also be consulted.

The Code Bustamante[2]

The provisions of the Code Bustamante which deal with the relations between husband and wife represent in general a compromise. Each of the contracting states is left free to treat domicil or nationality as the basis of the *statut personnel*, and the code does not seem to have much claim to be regarded as a measure of unification even in a regional sense. The delay which was experienced from 1890 to 1928 in arriving at an agreement furnishes an illustration of the extreme difficulty of reconciling the rival claims of the jurisdictions of the domicil and of the nationality.

This compromise does not, however, apply in its entirety to the case of divorce and separation. In this instance the competent jurisdiction is declared by Article 318 to be the domicil of the parties, and Article 52 provides that the right to divorce or separation shall be determined by the law of the matrimonial domicil. It was necessary, however, to secure the consent to these rules of those South American states which prohibit divorce, and this led to the insertion in the code of two limitations which greatly reduce its value as a unifying measure. Article 52 provides that a suit for divorce or separation cannot be founded on any ground which arose prior to the establishment of the matrimonial domicil, and Article 53 leaves to each contracting state the option of recognizing or rejecting the validity of any divorce granted to its citizens outside the territorial limits of the state. The result of these limitations is to leave the problem much as it was before the code came into force, and a state of uncertainty still exists as regards whether a divorce decreed in one of the contracting states will be treated as valid in all the other states.

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[1] Latey, *op. cit.*

[2] See the discussion of the relevant provisions of the code by Chéron, *op. cit.*, pp. 347 *et seq.*

The future of the problem

The experience of the past may well cause us to doubt whether any useful purpose will be served by continuing the search for a solution of the thorny problem presented by the conflicts of jurisdiction with which we have been dealing. It will not be sufficient merely to reconcile the conflicting claims of the national courts and of the courts of the domicil. The most serious hardships arise from the claim that the law of the nationality must always prevail, no matter whether the competent forum be that of the domicil or of the nationality. The different systems of law are sharply divided on this question, and the ill success which attended the negotiations for a compromise at the 5th and 6th Conferences of The Hague indicates the grave difficulty which will be experienced in obtaining any concession from those states which are upholders of the principle of the predominance of the *lex patriae*. One must also reckon with the danger that if methods of compromise are pressed too far the only result may be a *unification de façade* which will neither benefit nor satisfy any one.

The problem is, nevertheless, an urgent one. So long as the institution of divorce exists it is discreditable to private international law that uncertainty and confusion should characterize the present state of the rules which govern conflicts of jurisdiction in the case of suits for divorce or separation. The policy of leaving untouched rules which admittedly result in inconvenience and often in hardship is not one which should commend itself to those who have at heart the cause of international co-operation in the interests of justice. It may be argued that the cases in which a question of conflict of jurisdiction arises only form a small percentage of the cases which come into court, but whether this be so or not, practitioners of all nations are unanimous in declaring that when such cases do occur the hardship is often very great. Even in face of what may seem to be irreconcilable differences of opinion, no effort should be spared in the endeavour to find a remedy for one of the most regrettable situations to be found in the whole range of private international law. It is for this reason that the proposals which follow are put forward with great diffidence and in complete realization of the very delicate nature of the questions which are involved.

The failure of The Hague Convention of 1902 to provide an adequate solution of the problem is undoubtedly due to the fact that the system adopted in the convention represents the predominance of the national law over the law of the domicil. The assumption which underlies it is that the wife invariably follows the nationality of her husband, and that all questions concerning the dissolution of marriage should, therefore, be controlled by the national law. But whatever the state of affairs may have been at the beginning of the century, this assumption no longer holds good, and the tendency is to permit a woman to retain her original nationality on marriage, or to regain it if she is separated from her husband. In particular, if the husband changes his nationality by naturalization after marriage it does not follow that the wife's nationality will change in conformity. The cases in which the nationality of the husband differs from that of the wife are much more numerous than they were in 1902. But in any event the claim of the domicil to be recognized as the competent and effective forum for the dissolution of marriage is, to say the least of it, as cogent as that of the nationality. Where spouses have settled in a country with the definite intention of becoming members of the community among which they have decided to live, there does not seem to be any valid reason why they should not be entitled to resort to the courts of the country of their choice in order to obtain a settlement of their matrimonial differences in the same way and on the same terms as the other members of the community. The situation which arises when they are compelled to remain bound by a matrimonial tie which would be dissolved without any difficulty in the case of their neighbours is highly artificial and savours of injustice. It also furnishes a direct incentive to adulterous unions and to the employment of chicanery in order to gain release from a relationship which has become intolerable. One may ask oneself whether it is really necessary to make the right to a divorce depend on the national law of both or either of the spouses at the cost of the perpetuation of matrimonial unhappiness. The result must be to weaken the sanctity of the marriage tie and to open the door to fraudulent manœuvres designed to avoid the normal operation of the rules of competence. Would it not be preferable to allow the spouses, if they desire to do so, to resort to the courts of their domicil and to obtain redress on the same terms as those which are open to the people among whom they live? The concurrent jurisdiction of the national courts and the courts of the domicil in matrimonial matters has already received recognition to a large extent, as, for instance, in The Hague Convention of 1902; but this concession has been coupled with the consecration of the predominance of the *lex* *patriae* of the spouses—a restriction which has gone far to destroy the value of any recognition of the competence of the courts of the domicil.

The first proposal, therefore, is that the concurrent jurisdiction of the courts of the nationality and the domicil should be recognized, not only in the strict sense of the word, as meaning competence to adjudicate, but, in an effective sense, as power to adjudicate in accordance with the *lex fori.* The acceptance of this view of the nature of concurrent jurisdiction would go far to remove the doubts and uncertainties which exist at present. The spouses would, in the event of doubts as to their domicil, be entitled to resort to their national courts. So also, if the trouble and expense of instituting a suit in the national courts are prohibitive, the spouses can seek a remedy in the courts of their domicil. In either event, they would not run the risk, as at present, of obtaining in perfect good faith a decree which has no validity outside the area of the jurisdiction of the court granting the decree. Above all, they would not find themselves, as may happen at present, in the position of being deprived of all remedy, either because there is no court which will declare itself competent to adjudicate, or because the courts of their domicil may be powerless owing to the restrictions imposed on their competence by the terms of the *lex patriae* of one or other of the spouses.

The second proposal is that for the purpose of establishing the existence of competence in suits for divorce or separation the existing definitions of the term "domicil" should be ignored, and that habitual residence within the territory of the court for a fixed period should be required in the case of spouses of foreign nationality who resort to the courts of their domicil. The period required should be such as will suffice to prevent the possibility of migration from one country to another with the object of establishing a domicil. A period of either three or five years might be deemed to be sufficient for this purpose. The possibility of *fraude sur la loi* could also be minimized by a provision, such as that to be found in Article 52 of the Code Bustamante, which excludes any ground for divorce or separation arising prior to the establishment of the domicil on which competence is based in any particular instance. A decree of separation granted by a competent court should, however, carry with it the right of the wife to establish her independent domicil.

The third proposal relates to a type of case which would only be of rare occurrence, namely, where the spouses are not only of different nationality but are also domiciled in different countries at the time of the institution of the suit—which must be taken as the critical moment—so that neither the criterion of nationality nor that of the domicil is applicable. There would be no need to legislate for the case in which although the nationality of the spouses is different their domicil is the same, and vice versa, because the other concurrent jurisdiction would be available in such an event; but a special rule is required to meet the case in which neither the nationality nor the domicil of the spouses is the same. In such a case the spouses should be permitted to resort either to the courts of their last common nationality or to those of the last common domicil.

If the proposals outlined above were accepted, it would not be necessary to deal specially with such cases as those of "apatrides" and "polypatrides" because the courts of their domicil would be available to them. Nor would it be necessary to deal in a special manner with the case of a married woman who has obtained a decree of separation from her husband and subsequently become reintegrated as regards her original nationality. The courts of her domicil would be able to deal with the matter according to the *lex fori*, and the situation which has led to the denunciation of The Hague Convention by Switzerland, Sweden, and Germany could not arise.

It will have been observed that these proposals are in substance very much the same as those of the Convention of Stockholm. They are also on the same lines as those embodied in the Oxford Report of the International Law Association, though they have been elaborated in certain directions and simplified in others. In particular, the proposals of the Oxford Report as to the definition of the term "domicil" have been modified in view of the fact that the criterion of "domicil" as it exists in Anglo-American law is open to the criticism that it is uncertain in its operation in practice and that it would, in the writer's opinion, be unreasonable to expect the continental systems to accept it.

These proposals are, as already mentioned, not submitted in any unduly optimistic spirit, because it is realized that they are likely to meet with strong opposition.

In the first place, it is not clear what attitude the Anglo-Saxon countries would adopt. The difficulties which lie in the way of the recognition by these countries of competence based on the nationality of the spouses has already been referred to. Feelings of *amour propre* or pedantic considerations do not enter into the matter. The attitude of these countries is dictated by the exigencies of the constitutional position of the United States and the British Commonwealth of Nations. It would be very difficult for them to adhere to any international convention if its terms were to imply that United States citizens or British subjects could—where the validity of a decree is challenged—raise the plea that they had been divorced or separated by a national court. An impossible situation would arise, for instance, if Canadian spouses, who had obtained a divorce in London in circumstances which rendered it doubtful whether the Canadian or English courts had jurisdiction, could demand that a French court should nevertheless recognize the decree because, whatever the circumstances may have been, it was the decree of a court of their British nationality. This difficulty might, perhaps, be circumvented by the use of appropriate clauses in the convention, but the issue is of such a delicate nature that the governments of the Anglo-Saxon countries might be very reluctant to submit the question to discussion by an international assembly.[1]

The proposal that the competent court should always be at liberty to apply the *lex fori* is also certain to encounter very strong opposition, more especially from those countries which forbid divorce. But the past history of the problem has shown that insistence on the predominance of the *lex patriae* of the spouses is fatal to any scheme for unification.

The proposals which have been outlined represent a definite concession on the part of the supporters of the principle of the competence of the domicil. To begin with, the claim to exclusive jurisdiction by the domicil is abandoned in the case of spouses of foreign origin. Moreover, the proposals involve a radical reconstruction of the nature of the domicil required to create jurisdiction in the case of spouses resident in a country which is not that of their nationality. These concessions might perhaps induce the upholders of the predominance of the national law to modify their attitude. It is, nevertheless, to be borne in mind that it was precisely on this point that the scheme of unification embodied in the Code Bustamante came to grief.

The proposals do not in any way require any country to modify its law in the case of nationals who are resident in the national territory. They merely deal with the case of spouses of a given nationality who have elected to establish their matrimonial home in a foreign country. Insistence on the predominance of the national law in such cases is not likely to act as a deterrent to the practice of resorting for a divorce to the courts of the domicil, followed by re-marriage, and its only result can be to create relationships which in the domicil may be perfectly regular but are adulterous *vis-à-vis* the national law of the parties. Such a situation is unfortunate as regards the spouses and unjust as regards the offspring of re-marriages which are entered into in the honest belief that a valid decree of divorce has rendered them possible. If it is urged that the state ought not to countenance the dissolution of a marriage of its nationals on grounds which are not recognized by the national law, the answer is twofold. If such a dissolution is decreed on grounds of a scandalous nature the matter can be dealt with by applying the national rules of *ordre public.* In the residue of such cases the experience of the Anglo-Saxon countries seems to show that no harm results from the recognition of grounds which are not known to the national law of the parties. A possible alternative might, perhaps, be found in the enumeration in the convention of the permissible grounds of divorce for international recognition, or in the exclusion from the operation of the convention of certain specified grounds of divorce which are not universally recognized.

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[1] The matter of nationality as it arises within the British Commonwealth is under consideration by the Imperial Conference but cannot be said to have been settled. For the kind of problem which arises see *British Year Book of International Law*, Vol. XVII (1936) at p. 187. A somewhat similar situation may exist in the case of a unitary state, e.g. Poland, but the problem is less delicate and difficult in such instances, owing to the existence of a central government.

In conclusion, the above proposals, which are admittedly sketchy and incomplete, are put forward in the belief that unification is not possible along any other lines. If this belief is well founded there would seem to be no other escape from the present situation.

Judicial Separation

The rules which govern competence in the case of suits for separation are, broadly speaking, the same as in the case of suits for divorce, but the situation which arises in practice is much less complicated because there can be no question of the right to re-marry and the rules are consequently applied with less rigidity. There are, however, certain problems, which are largely of a technical character and arise from the fact that the institution of *separation de corps* is not recognized in all systems of law. Certain countries allow both divorce and separation, others recognize divorce only, and a few countries reject the possibility of divorce but admit separation. In one instance, that of German law, an institution is found (Aufhebung der ehelichen Gemeinschaft) which has no parallel elsewhere, though in some respects it resembles separation. The importance of these distinctions lies in the fact that they raise the issue whether a foreign court can grant a decree of separation if the national law of the spouses does not recognize the right to such a decree. A similar problem arises if the court of the domicil does not recognize the right to a separation though conceded by the national law of the parties. These questions would not, however, arise if the right to a decree of separation is assimilated to the right to claim a divorce and the question of the remedy is left, as has been proposed, to the *lex fori*. A somewhat more delicate question emerges in connexion with the rules of law in certain countries, which enable a decree of separation to be converted into a decree of divorce after the lapse of a specified period. This is a matter which might well be left to be determined by the *lex fori*. If the law of the domicil contains no provision for the transmutation of a decree of separation into a decree of divorce, although this is permitted by the *lex patriae* of the spouses, the obvious solution seems to be for the spouses to resort to their national courts.

Conclusions

The temptation to regard the problem of the basis of competence, taken as a whole, as being insoluble in the case of matters of divorce is very strong, but to succumb to a spirit of "defeatism" can only lead to the indefinite postponement of a question which indisputably spells misery and unhappiness to a large number of persons. The law relating to divorce and separation is nowhere static, and it may well be that as time goes on an approximation of rule may render the problem very much less acute than it is at present. In the meantime, it would seem to be the duty of the jurists of all nations to continue to explore the situation in the hope, faint though it may be, of finding some solution which will meet with general acceptance at a future date, if not now.

There are, of course, a number of questions which arise in connexion with this matter and which it has not been possible to discuss within the available limits of space. Such questions are those, for instance, of jurisdiction in suits for nullity of marriage, of the period within which divorced parties should be permitted to remarry and of the consequences of a decree of divorce. There is also the extremely difficult and controversial problem of the bearing of the doctrine of *Renvoi* on the question of competence. These are, however, all matters which are subsidiary to the principal and most urgent problem of all, which is to endeavour to establish an agreed basis of competence which will function so as to dispel the cloud of uncertainty and complexity at present characterizing the exercise of jurisdiction in matters of divorce and separation, in cases containing an international element and thus giving rise to the possibility of conflict.

THE UNITED STATES "NEUTRALITY" LAW OF 1937

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In an article entitled "Recent Neutrality Legislation in the United States" published in the *Year Book* for 1936, I explained briefly and endeavoured to evaluate two temporary resolutions, popularly known as "neutrality" measures, passed by the Congress on August 31, 1935, and February 29, 1936. In that article I expressed the hope that this hastily passed stop-gap legislation, for such it was, might be replaced, upon its expiration, by a more carefully considered law based upon more thorough study and a fuller understanding of the realities of the situation. So far as replacing it with a new law was concerned, this hope was realized by the joint resolution of Congress passed on May 1, 1937 (the date of the expiration of the existing law), the character of which it is the purpose of this article to discuss and evaluate.

It may be recalled by the readers of my former article that the principal features in the scheme of neutrality provided for in the earlier resolutions were: (1) an automatic mandatory embargo to be laid on the exportation from the United States of arms, ammunition, and implements of war to any belligerent state or to any neutral port for transhipment to, or for the use of, a belligerent country whenever the President shall have proclaimed the existence of a war, (2) a prohibition on the making of loans of money or the extension of financial credits to any belligerent country or organization, and (3) the authorization of the President to forbid in his discretion American citizens to travel on belligerent ships on the high seas except at their own risk. The resolutions contained several other provisions of no great importance. The prohibitions and restrictions thus envisaged were to be applied equally and impartially to both or all belligerents save in the case of a Latin-American republic engaged in war with a non-American state, which was to be excepted from the application of the law unless it was co-operating with a non-American state in the prosecution of a war. This exception, which is retained in the present law, was apparently based on the assumption that if a Latin-American republic were at war with a European or Asiatic state the latter would be an aggressor and a violator of the Monroe Doctrine, and the United States must therefore assist the Latin-American victim by permitting it to obtain war supplies and loans in the United States with which to defend itself, while they would be denied to the non-American aggressor. The possibility that the reverse might be the case, that is, that the Latin-American belligerent might be the aggressor and the European or Asiatic belligerent the victim, and that the United States would in that event be put in the position of giving assistance to the aggressor, and that the Act, instead of insuring the United States against being drawn into war, might cause it to become involved therein, does not seem to have occurred to the Congress. It will be noted that the exception thus made to the rule of equality of treatment of all belligerents, which is a basic principle of the law, is allowed only when the Latin-American belligerent is not co-operating with a non-American state in the waging of a war. American friends of the League of Nations regard this latter proviso as having been aimed at the Latin-American Members of the League who in fulfilment of their obligations under the Covenant might be co-operating with the League in military measures against a Covenant-breaking Member, since in that case the United States embargo on arms, munitions, and loans and the other restrictions of the Neutrality Act would be applicable to them, whereas they would not apply to a Latin-American non-member of the League which might be engaged in war against a European or Asiatic state independently of and not in co-operation with the League.

More defensible exceptions to the general principles laid down by the Act were made in the case of the prohibition on loans, also retained in the present law. In the first place, the prohibition does not apply to "a renewal or adjustment of such indebtedness as may exist on the date of the President's proclamation" declaring the existence of a state of war. In the second place, he is authorized to except from the operation of the prohibitory section "ordinary commercial credits and short-time obligations in aid of legal transactions and of a character customarily used in normal peace-time commercial transactions". What are such credits and obligations the President may, within certain limits, determine, subject perhaps to the control of the courts. Probably it would not be legal for him to allow credits for the purchase of arms and munitions, since their exportation is unlawful, though it might be for financing the purchase of other materials essential to the carrying on of war. It is probably safe to assume that if the extension of credits should prove necessary to finance a large and profitable foreign trade with belligerents in other commodities than arms and munitions the President would interpret his authority as broadly as possible, somewhat as President Wilson, for the same reason and under similar circumstances during the World War, was led to revoke the ban originally placed upon loans to belligerents.

Turning now to a consideration of the resolution of 1937 which replaced the earlier ones, it may be noted that, unlike them, it is intended to be permanent in duration, save for the "cash and carry" provision, the duration of which by its own terms is limited to two years. The essential provisions of the earlier resolutions were retained, without material change, in the present law. Some of the provisions of the earlier resolutions were, however, retained in modified form. Thus, while the original resolution of 1935, authorizing the President to enumerate by proclamation the arms, ammunition, and implements of war that shall be subject to the embargo, was retained, it was added that any list issued by him must include those enumerated in his proclamation of April 10, 1936, but must not include "raw materials or any other articles or materials not of the same general character" as those enumerated in the said proclamation and in the Geneva Convention of 1925 for the Supervision of the International Trade in Arms, Ammunition and in Implements of War. The purpose of this amendment was to restrict the President's discretion and particularly to prevent him from extending the embargo to apply to certain articles not having the character of arms, ammunition, and implements of war, as he had been urged to do during the Italo-Ethiopian War.

Likewise, the provision which in effect authorized the President to proclaim that no citizen of the United States might travel on the vessels of any belligerent nation *except at his own risk* was amended so that in the future, whenever the President shall have issued a proclamation declaring the existence of a state of war, it shall be unlawful from that moment for any citizen, with a few exceptions, to travel on a belligerent vessel even at his own risk, save in accordance with such rules and regulations as the President may prescribe.[1] The reason why permission to travel on such vessels at the traveller's risk was withdrawn was apparently the fear that if another *Lusitania* tragedy should occur, with the loss of the lives of several hundred American citizens, the fact that they were travelling at their own risk and had embarked with full knowledge that they were so doing might not be sufficient to restrain an inflamed public opinion from demanding action against the belligerent responsible for the tragedy, and the demand might be so widely supported that the government would find it difficult to disregard it. The only sure way, therefore, by which the United States could avoid being drawn into controversies arising out of such incidents, and possibly becoming involved in the war, was to prohibit American citizens from travelling on such vessels even if they were willing to do so at their own risk, except under such conditions and subject to such restrictions as the President might prescribe.

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[1] The prohibition does not apply to an American citizen who has begun a voyage on a belligerent vessel prior to the President's proclamation, nor, until 90 days thereafter, to any citizen returning from abroad. Moreover, the President may except particular persons from the operation of the prohibition, for example, newspaper correspondents, whose duties may make it urgent that they travel on belligerent vessels. There would seem to be no reason, however, why he might not make sweeping exemptions from the operation of the prohibitory clause if he should choose to do so.

In so doing the United States abandoned the position it took during the World War, that the right of citizens of a neutral state to travel on merchant vessels of a belligerent without being destroyed by the submarines of another belligerent is sanctioned by international law. When, therefore, it was proposed by the Gore-McLemore resolution in February 1916 to warn American citizens against taking passage on armed belligerent merchantmen, President Wilson vigorously opposed it, declaring that he would not consent "to any abridgment of the rights of American citizens in any respect", and he added: "to forbid our people to exercise their rights for fear we might be called upon to vindicate them would be a deep humiliation indeed". The President virtually demanded that the resolution be defeated, and it was. It will be noticed that the proposal then was merely to warn American citizens against travelling on *armed* belligerent merchant vessels, whereas the present law forbids them to travel on any belligerent merchant vessel whether armed or unarmed. Considering the object of the prohibition, it may not be improper to suggest that logic might require it to be applied to travel on foreign neutral vessels carrying contraband, and to American vessels voyaging in areas of the sea which have the character of war zones, or which may themselves be carrying contraband, since they, too, are liable to be sunk by belligerent cruisers or submarines, and if American lives are lost on them the United States may be drawn into the war through the controversies to which the sinkings may give rise. At least, this is the theory of the travel prohibition provision of the present law.

Passing now to the new provisions of the resolution of 1937, we may note, in the first place, the extension of its application to civil wars. The earlier resolutions were limited in their application to "wars between or among two or more foreign states", that is, to international wars. When, therefore, the civil war broke out in Spain in July 1936 the President found that he had no authority to lay an embargo on the exportation of arms and munitions to or for the use of either the government of Spain or the insurgents. The government did, however, exert its moral influence and even pressure in the effort to induce American manufacturers and exporters to refrain from shipping such supplies to either side, and for some months it was successful. But when in December 1936 an application was made for a licence to ship nearly $3,000,000 worth of aircraft material, presumably for the use of the Spanish Government, the Munitions Control Board, the authority charged with issuing licences, had no authority to refuse it and it was accordingly issued. Several licences for shipments of similar materials followed during the succeeding week. The President, while recognizing the shipments to be legal, publicly characterized them as unpatriotic, and he caused various European governments to be informed that he sincerely regretted "the unfortunate non-compliance by an American citizen with this government's strict non-intervention policy". At his request, the Congress promptly passed (January 8, 1937) a resolution making it illegal to export arms and munitions to Spain or to any other country for transhipment thereto or for use of either of the opposing forces in Spain, but it came too late to stop some of the shipments for which licences had already been issued.

The embargo thus laid applied equally to both sides, the forces of the Spanish Government and those of the insurgent organization, although it did not prohibit the sale and export of arms and munitions to Germany and Italy, both of which were openly intervening on the side of the insurgents, and for this reason the Act was criticized by certain representatives in Congress and by various groups throughout the country in sympathy with the Spanish Government, who charged that its effect was to put the United States in the position of indirectly aiding those who were making war against the legitimate government of Spain. It was not without significance in this connexion that General Franco publicly expressed his gratification at this action of the United States and that similar expressions of approval came from Germany.[1]

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[1] Buell, "U.S. Neutrality in the Spanish Conflict", *Foreign Policy Reports*, Nov. 15, 1937, p. 211.

The embargo resolution of January 8, 1937, was a special Act to stop the exportation of arms and munitions to Spain. It had no application to civil wars which might break out in other countries. It remained therefore for the framers of the permanent neutrality law of May 1, 1937, to deal with civil wars in general. This was done by the addition to the existing law of a new clause providing that whenever the President finds and proclaims that a state of "civil strife"[1] exists in a foreign state and is of "a magnitude or is being conducted under such conditions that the export of arms, ammunition and implements of war from the United States to such foreign state would threaten or endanger the peace of the United States" it shall be unlawful to export such commodities to such foreign state or to any neutral state for transshipment to or for the use of such foreign state.

The existing legislation was strengthened by the addition of several other new provisions. One of these was designed to prevent the use of the ports of the United States as bases of supply for the shipment of fuel, men, arms, ammunition, and other war materials to belligerent war vessels, tenders, and supply ships at sea. During the World War complaints were made by the British Government that both neutral vessels and German merchant vessels refugeeing in American ports, then neutral, took on supplies of coal and other commodities therein and delivered them to German warships at sea. In response to these complaints the American Government adopted more stringent measures to prevent German merchant vessels from leaving the ports of the United States with large supplies of coal which were assumed to be intended for delivery to German war vessels or supply ships at sea. Particularly, clearance papers were refused to such vessels, and various officials of the Hamburg-American Line were convicted and sentenced to terms of imprisonment for having obtained clearances by means of fraudulent manifests. Ports on the Pacific coast were also used as bases for a similar illicit traffic.[2] The new law authorizes the President in his discretion to require the owner or master of a vessel suspected of an intention to engage in such traffic to give a bond as surety against it, and it also authorizes him to prohibit a vessel which has once done this from departing again from a port of the United States while the war lasts.

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[1] This term is not altogether a satisfactory one since a state of "strife" is not necessarily a state of "war". It may have been used for the purpose of avoiding the possible contention that an embargo could not be laid unless the rebels had acquired the status of belligerents. The term is used in the Havana Convention of 1928 on the rights and duties of states in the event of "civil strife" and it may have been taken from that convention.

[2] As to the details see Garner, *International Law and the World War*, Vol. II, p. 415.

Another new provision of the law extends the power which the earlier resolutions had conferred on the President to prohibit foreign submarines, subject to such restrictions as he may prescribe, from entering or departing from the ports of the United States, to include also armed merchantmen. The controversy between the United States and some of the belligerents during the World War regarding the status of armed merchantmen in its ports will be recalled. But there appears never to have been a demand on the part of either the British or German Government that the armed merchantmen of the enemy should be denied entry to American ports, although the British Government declared that it would hold the American Government responsible for any damages by armed German merchantmen which were allowed to depart from United States ports or by unarmed German merchantmen which after being allowed to leave such ports should be reconverted on the high seas into war vessels. Fortunately no serious conflicts arose between the United States and either of the opposing belligerents regarding the matter, but the controversy which had been precipitated was embarrassing, and it was the desire to reduce if not remove entirely this source of possible conflict that led the Congress in 1937 to confer on the President authority to exclude such vessels, absolutely or subject to conditions and restrictions, from entering or departing from the ports of the United States whenever in his judgment it would contribute to insuring the neutrality of the country, protect its commercial interests, and promote its security.

The above provision has to do with the treatment by the United States (when neutral) of armed merchantmen of belligerent nationality which may wish to enter or leave its ports. Another provision of the new law forbids *American* vessels engaged in commerce with a belligerent from being armed or carrying arms and munitions (except small arms and ammunition deemed by the President necessary for the preservation of discipline on board) whenever he shall have proclaimed the existence of war. Again it will be recalled that in March 1917, following the resumption by Germany of the policy of unrestricted submarine warfare, the President of the United States announced that "armed guards" would be placed on such merchant vessels registered under the American flag as might request them for the purpose of defence against attack by German submarines. This decision was attacked throughout Germany and by German sympathizers in the United States on the ground, as alleged, that neutral merchant vessels have no lawful right to arm themselves and resist attack by the war vessels or submarines of a belligerent, and that those which do so would be in the position of pirates.[1] Notwithstanding the German protest the policy announced by the United States was put into effect, and before the outbreak of war with Germany on April 6 a considerable number of American merchantmen had been armed. In so far as the right of neutral merchant vessels to defend themselves against belligerent submarines which do not exercise the right of search and capture in accordance with the established rules of international law is concerned, the German contention was quite indefensible. Those who adopted the German view confused, it is believed, the right of neutrals to resist unlawful attacks, with resistance to the exercise of a lawful belligerent right.[2] Nevertheless, since the American claim of right had been denied by a belligerent, the Congress of the United States was willing in 1937, as in other instances, to renounce it in order to avoid controversy with belligerents whose own strategic interests might lead them to adopt the contrary view. It is not clear, however, why the prohibition in respect to the arming of American merchant vessels should have been limited to those which are engaged in commerce with a belligerent, since the arming of merchant vessels of one neutral state engaged in commerce with other neutral states might as easily give rise to similar controversies with belligerents.

We come now to the last and most important of the new provisions of the Neutrality Act of 1937, namely that which embodies the so-called "cash and carry" scheme. Neither of the resolutions of 1935 or January 1937 provided for the imposition of restrictions upon the sale or exportation from the United States of other articles or commodities than arms, ammunition, and implements of war. Trade in such goods between the United States and belligerents or with other neutral countries was left free to be carried on as in time of peace, subject to no restrictions other than those prescribed by international law. But it was clear to many members of Congress from the outset that an embargo whose avowed object was to reduce the causes and occasions for controversy between the United States and belligerent states but which was limited in its application to trade in arms and munitions would accomplish only a part of its purpose, since American ships engaged in transporting to or for the use of belligerents other materials essential in the manufacture of arms and munitions or in the conduct of war would be equally exposed to detention, seizure, confiscation, or destruction along with the goods carried by them. The experience of the United States during the early years of the World War abundantly justified the conclusion that this would be the case in a future war in which the United States was neutral, if trade in such commodities was allowed without restriction. Several bills were accordingly introduced which envisaged restrictions on trade with belligerents in such articles and materials. One of them proposed to limit their exportation to the normal pre-war quantities imported by such countries from the United States. Another one, based on the idea of the impracticability of the pre-war quota scheme, proposed to authorize the President to extend the embargo on arms and munitions to include such other articles or materials, the exportation of which to belligerents should, in his judgment, be prohibited. Both of these proposals were, however, objectionable to the majority of Congress, the first one because of the practical difficulties which it was believed would be encountered in its enforcement; the second one, because, first, of the strong opposition to conferring so wide a discretionary authority on the President, which, it was said, would make him a virtual dictator over the foreign trade of the country, and, second, because Congress feared that a further extension of the embargo to include many of the most important articles of export might prove ruinous to American foreign trade and bring on an economic depression so disastrous that Congress would be forced by public opinion to repeal it as it was forced to repeal the Jeffersonian embargo, and if that were done during the course of the war and it resulted in greater benefit to one belligerent than to the opposing belligerent the latter would complain that it was an unneutral act, somewhat as the British Government let it be known in 1916 that it would regard the laying of an embargo on the exportation of arms and munitions to the belligerents at that time as unneutral because the effect would have been to alter the existing situation to the advantage of Germany and Austria. There is good reason to believe also that the fear that the extension of the embargo to such articles might interfere with the success of the President's policy of concluding reciprocal trade agreements with certain countries such as Great Britain, had something to do with the defeat of the proposal. At the same time Congress apparently realized that if the purpose of a trade embargo is to reduce the possibility of controversies and conflicts between the neutral laying it and belligerent countries, no logical distinction can be made between the furnishing of a belligerent with arms and munitions and the furnishing of him with the raw materials out of which they are manufactured or with other articles such as oil, rubber, tractors, and the like which are essential to the carrying on of war, and that therefore the shipment, especially on American vessels, of the latter kinds of materials and commodities when owned by citizens of the United States might prove to be as prolific a source of dangerous controversy with belligerents as the shipment of arms and munitions. The problem of Congress therefore was to devise a scheme which would avoid the ruinous economic consequences of an embargo on a large and important volume of American foreign trade but which would at the same time remove or reduce substantially the causes of controversy and possible conflict with belligerents which would almost certainly result if such trade were permitted without restriction. While the Congress was by no means convinced either of the wisdom or effectiveness of the "cash and carry" scheme as a solution of the problem it was willing to adopt it as an experiment, and this it did, though apparently with little confidence in its utility or expediency.

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[1] As to the details see the author's work cited above, Vol. I, p. 414.

[2] The author does not therefore share the opinion of Borchard and Lage (*Neutrality for the United States*, 1937, p. 341) that neutral merchant vessels have no right, apparently under any circumstances, to resist attack by the warships of a belligerent.

In brief, the new law authorizes the President, if in his judgment the placing of restrictions upon the exportation of other articles or materials than arms, ammunition, and implements of war to belligerent states or to a state in which "civil strife" exists, would promote the security or preserve the peace of the United States or protect the lives of the citizens thereof, so to proclaim, and thereafter it will be unlawful for any American vessel to carry such articles or materials as may be enumerated by him, to any such belligerent state or to any neutral state for transhipment thereto. When the President has so proclaimed, it will likewise be unlawful to export or transport from the United States any such articles or materials to any belligerent state or any neutral state for transhipment to or for the use of a belligerent state until the American ownership, title, or interest in them shall have been divested and transferred to a foreign owner. The President is empowered to make exceptions and relaxations in respect to trade on or across lakes, rivers, inland waters, and lands bordering on the United States—this for the purpose of preventing the interruption of ordinary trade between the United States and Canada, since the carrying on of such trade could hardly be subject to belligerent interference and would not therefore involve the United States in disputes with any belligerent. The opinion has been expressed that the language of this exception clause is sufficiently broad to authorize unlimited trade in war materials (except of course arms, ammunition, and implements of war to which the embargo applies) between the United States and Canada and their transhipment to England if she were a belligerent.[1]

The underlying principle of the "cash and carry" device is that while the markets of the United States will be available to any and all belligerents equally for all such articles and materials as are listed in the President's proclamation, belligerents must pay cash for them, presumably in gold, acquire ownership title to them before they can be removed from the United States, and they must be carried away in their own or other non-American vessels. Since American citizens will no longer have any legal interest either in the cargoes or in the vessels on which they are transported, if they are seized by a belligerent, detained, confiscated, or sunk after leaving an American port, the Government of the United States will not be called on to intervene in their behalf and consequently there will be no occasion for a controversy between it and the belligerent who has interfered with the shipment. Trade in other articles and materials not listed in the President's proclamation (except, of course, arms and munitions) may be carried on, as formerly, without restriction though subject, of course, to the risk of the trader in case they are contraband of war or are destined to a blockaded port.

A feature of the scheme which was the subject of long and animated debate in Congress is that the question as to whether it shall be put into effect upon the outbreak of a particular war is left entirely to the discretion of the President, as is also the determination of the articles and materials to which it shall apply. In this respect it differs from the embargo provision relative to the exportation of arms, ammunition, and implements of war, which is mandatory and goes into effect automatically as soon as the President shall have proclaimed the existence of a state of war. A group of senators and representatives, however, wished to make the "cash and carry" scheme likewise automatic and mandatory, for the reason, they argued, that if the putting of it into effect were left to the discretion of the President he might use his discretion in such a way that it would produce an unequal effect as between the opposing belligerents and would therefore lack the quality of neutrality, as, for example, if he should delay putting the scheme into effect until some months after the outbreak of the war when its going into operation might injure one belligerent more than the other. But this might be equally true if it were put into effect immediately upon the outbreak of a war, as it might also be true of the imposition of an embargo or even of the lifting of an embargo. There were also, of course, those who feared that the unlimited discretion which the law conferred on the President to determine what commodities should be subjected to the "cash and carry" restrictions would enable him to bring under the operation of the scheme as large a proportion of the foreign trade of the country as he might choose. But the majority of the Congress were unwilling to make the going into effect of the scheme automatic upon the proclamation of the existence of war anywhere in the world however remote its theatre of operations might be from the United States or however local or unimportant its character, because in that case the foreign trade of the country with the belligerents and even with neutral countries adjacent to them, in such articles would become subject to the restrictions of the "cash and carry" scheme. The only way to avoid such a consequence therefore was to leave to the President to determine whether the character and circumstances of the particular war were such that the objects of the Neutrality Act would be promoted by the putting of the scheme into effect.

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[1] Buell, "The Neutrality Act of 1937", *Foreign Policy Reports*, Oct. 1, 1937, p. 172.

As to the merits of the scheme, if it should ever be put into effect, there would seem to be little doubt that in thus withdrawing American ships from the carrying trade and in requiring American-owned goods shipped from the United States to or for the use of belligerents to be transferred to foreign ownership before they leave American ports, the causes and occasions for disputes with belligerents will be materially reduced, the degree depending in part upon the number and importance of the articles to which the restrictions of the "cash and carry" policy are applied and in part upon who are the belligerents.

But there are obviously some serious objections to the scheme. In the first place, if the list of such articles should be an extended one embracing many important articles of American export, and if the war should be widespread in area and long-drawn-out in duration, the prohibition on American vessels from transporting such articles might seriously cripple the American carrying and ship-building industries. In the second place, it might easily happen that some or all the belligerents would find it impossible to pay cash in gold for the vast quantities of supplies which they wished to take from America but which would not be available until they were paid for. It usually comes to pass sooner or later during a war of wide area and of prolonged duration that belligerents find themselves without the necessary foreign exchange with which to make purchases of supplies abroad. The Allied Powers which purchased huge quantities of war supplies in the United States during the first two years of the World War found themselves very nearly in this situation before the end of the year 1915, and had not the American Government removed the ban which in the beginning it had put upon loans to belligerents and permitted them to establish credits in the United States with which to finance their purchases, it is doubtful whether they would have been able to continue them much longer. It was the prospect of losing this profitable trade and the possibility of a serious economic depression in the United States which it was feared would follow in its wake that led the American Government to alter its original policy of prohibiting loans and credits to belligerents.[1] Now the present law forbids the extension of loans and credits to belligerents subject to the not very important exceptions referred to above. Under any reasonable interpretation the relaxation authorized by the Act, if made by the President, would not go very far toward enabling belligerents to finance extensive purchases of supplies in the United States. In these circumstances belligerents which are not fortunate enough to possess large available gold reserves or convertible securities in the United States—and few of them are likely to be so fortunate—will be unable to make use of the American market, and it might happen therefore that in a future war of widespread area and of long duration American foreign trade would shrink to very small proportions and consequently serious economic depression might thereby be produced. The cost of this somewhat dubious form of insurance against the risk of the United States being drawn into the war might therefore prove to be greater than its value. It is not inconceivable, indeed, that American exporters and carriers might in a particular war prefer to be left to trade at their own risk rather than to operate subject to the "cash and carry" restrictions.

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[1] See as to this, Baker, *Woodrow Wilson—Life and Letters, Neutrality, 1914–1915*, pp. 380 *et seq.*

A third objection which has been made against the "cash and carry" device is the inequality with which it is almost certain to operate in practice as between opposing belligerents in a war in which the belligerent on one side possesses an adequate merchant marine for transporting supplies across the ocean, a navy powerful enough to protect it while so engaged, and an available supply of foreign exchange with which to pay cash for goods purchased in the American market, while his enemy lacks some or all of these essential instrumentalities and resources. Belligerent line-ups in Europe are easily conceivable in which this will be the situation. Such would be the case, for example, in a war between Great Britain and Germany or between Great Britain and France on one side and Germany and Italy on the other. In the former case Great Britain with her large gold reserve and the enormous volume of American securities owned by English and Canadian investors (estimated at $2,000,000,000) which in case of necessity could be converted into American credits, her vast merchant marine which would be available for transporting supplies from America and a navy capable of protecting this trade against German interference, would be able to avail herself of the American market whereas it would be virtually closed to Germany. The undeclared war now going on between China and Japan affords a striking example of how unequally as between the opposing belligerents the "cash and carry" system would operate if it were put into effect, since Japan alone by reason of the strength of her navy and her merchant marine would be able to draw supplies from America, assuming that she could find the necessary foreign exchange with which to finance her purchases, whereas China would not be.

It must, however, be observed that this inequality as between the opposing belligerents in respect to access to the American market would exist in any case in a war in which one belligerent possessed the instrumentalities and resources mentioned and his enemy did not, whether the "cash and carry" system were in operation or not. In short, it is not so much that system which would give the advantage to one belligerent as his naval superiority, transportation facilities, financial assets, geographical situation, and other factors which may exist quite independently of the "cash and carry" restrictions. As has already been pointed out, the embargo on arms, ammunition, and implements of war which goes into effect automatically upon the issuance by the President of a proclamation declaring the existence of a state of war will also operate unequally as between two belligerents, one of whom is already well supplied with those articles or which possesses plants for manufacturing them or which has facilities for importing them from other neutral countries, when the other belligerent lacks some or all of them. The truth is, no system of trade relations between neutrals and belligerents can be devised which will in practice always operate equally as between opposing belligerents in a maritime war unless it is so arranged as to neutralize the inequalities of their respective situations resulting from the differences of their geographical positions, naval power, financial resources, &c., but in that case it would not be a neutrality measure. The criticism, therefore, that the "cash and carry" scheme will almost necessarily operate unequally between the opposing belligerents, and that in consequence it represents an unneutral policy does not seem to be well-founded, considering that a policy of unrestricted trade with all belligerents would in most cases lead substantially to the same result. This is the way it actually operated as between the Allied and Central Powers during the period of American neutrality in the World War, and when the latter powers protested to the Government of the United States it correctly replied that the duty of a neutral does not require it to endeavour by legislation or otherwise to remove the disadvantages which the belligerents on one side are under because of their unfavourable geographical situation, their lack of naval power, and their want of transportation facilities and thus insure them equality of access with their more favoured enemies to the munitions markets of the neutral.

A more practical objection to the scheme, aside from its unfavourable economic effects upon the United States, are the administrative difficulties that would probably be encountered in its enforcement, since by the terms of the resolution the restrictions which it imposes upon the exportation from the United States of the articles and materials listed in the President's proclamation apply not only to shipments destined directly to belligerent countries but also to those destined to any neutral state for transhipment to or for the use of a belligerent state. The provision for a mandatory embargo on arms, ammunition, and implements of war is identical in this respect. How the port authorities will be able to determine whether a cargo consigned to a neutral port is intended for transhipment to or for the use of a belligerent, and therefore whether the restrictions of the "cash and carry" clause are applicable or not, is far from clear. In case the neutral state is in close proximity to belligerent territory, and especially if the importations by the neutral state of the articles listed in the President's proclamation are greatly in excess of its normal pre-war importations from the United States, inferences might be drawn as to their ultimate belligerent destination or use, as they were by the British Government during the World War in similar circumstances. But if the neutral port of consignment were in a distant part of the world and there were no quota system of imports, inferences of belligerent destination would be of dubious validity.

How effective the "cash and carry" scheme would prove as a measure for preventing the United States from being drawn into a foreign war and how much it would cost the country in the form of loss of trade and injury to the ship-building and ocean-carrying industries it is impossible to estimate. The Congress itself was evidently far from convinced either as to the effectiveness of the scheme or as to whether its value would be worth the price which the nation would have to pay for it, and in these circumstances it decided to limit the duration of the section which provides for it to two years, whereas the other provisions of the law are intended to be permanent. Before the expiration of this period the scheme will be up again in the Congress for reconsideration. In the meantime, since the President is believed to have little faith in its utility, there is not much likelihood that he will put the scheme into effect either during the present war between China and Japan (unless perhaps Japan should formally declare war against China), or during any other war that may occur during the two-year period of its duration. Consequently there will probably be no opportunity to test it out in practice—at least not during the term of office of the present President.

Regarding the Neutrality Act of 1937 as a whole, one is struck by the large degree of discretionary power which it confers on the President in determining the actual policy of the country under the Act.

As the Act now stands its only important mandatory provision is that relating to the embargo on arms, ammunition, and implements of war, and even its going into effect is dependent upon the action of the President in proclaiming the existence of a state of war. The more one examines the text of the law, the more evident it becomes that the neutrality policy of the United States under that Act is left in large measure to the determination of the President. In this respect the enactment of the law represents a notable defeat for the isolationists who demanded a "legislative" rather than an "executive" neutrality and who wished to leave little or nothing to the discretion of the President. One of the principal criticisms which emanates from this group is that it virtually makes the President a dictator and puts it within his power to make the United States as unneutral as he wishes it to be.[1]

Although defeated on this point the isolationists were successful in that they were able to bring about the enactment of a law which is based almost wholly upon the philosophy of isolation—that is, upon the idea that the surest way by which the United States can avoid being drawn into the wars of other countries is to have as few commercial and financial relations with the belligerents as possible. In short, when war breaks out in some other part of the world the United States should withdraw as far as possible into its shell—take refuge in the storm cellar and enjoy the security which it offers until the storm passes over. Some of its critics have described it as a "scuttle and run" policy.

It is believed that the logic and philosophy of the law are unsound for several reasons. In the first place, they assume that when war breaks out anywhere in the world the chances that the United States will be drawn into it are so great that hardly any price is excessive for insurance against the risk. In the second place, if it be assumed that the law will prove effective in preventing the United States from being drawn into wars between other countries on account of trade disputes with belligerents, we are still faced by the danger of conflict arising from other controversies, against which the present law makes no attempts to provide safeguards. Disputes between belligerents and neutrals in respect to trade in arms, munitions, and war materials are only one of a long list of causes which may draw a neutral into an existing war. Territorial aggressions, infringements upon national sovereignty, insults to the flag, denials of justice, the sinking of neutral vessels other than those engaged in trade with a belligerent, violations of neutrality, the influence of hysteria, emotionalism, misunderstanding resulting from false propaganda, &c., are as prolific causes of war as are trade disputes between belligerents and neutrals, but the American Neutrality Act takes no account of them and makes no effort to insure the United States against being drawn into war thereby.

Although popularly referred to as a "Neutrality" Act the law is really not such, in the sense in which the term neutrality is understood in international law, that is, its purpose is not to prohibit conduct on the part of the government or individuals which might be regarded by either belligerent as unneutral or to protect the neutrality of the United States against acts in violation thereof by the belligerents. In fact, the Act contains very few provisions intended to accomplish either of these objects. In the main its purpose is to prohibit or reduce to a minimum certain contacts and relations of the United States with belligerent countries which, it was believed, were sources of possible conflict between it and them. It has been suggested that the law might more accurately be entitled "An Act to isolate (or insulate) the United States during the existence of war between other states". It may be remarked in this connexion that among the isolationists a favourite form of expressing the purpose of the law is to say that it seeks to "quarantine" the United States against foreign wars.[1]

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[1] Cf. Borchard and Lage, *Neutrality for the United States*, pp. 337 *et seq.*

It is, of course, not a valid objection to the law, from the legal point of view, that it should go beyond the requirements of international law in imposing upon the commercial, financial, and shipping industries of the country prohibitions and restrictions which the duties of neutrality do not require, unless it conflicts with the treaty obligations of the United States. There is some ground for believing that in fact the present law does this. Thus by the terms of the Havana Convention of 1928 regarding the Rights and Duties of States in the Event of Civil Strife, by which the United States is bound, the parties are obliged "to forbid the traffic in arms and war material, except when intended for the government, while the belligerency of the rebels has not been recognized". But under the United States Neutrality Act the embargo applies both to the government and the rebels whenever the President proclaims the existence of civil strife.

The treaty of July 23, 1902, between the United States and Spain provides (Art. II) that "there shall be a full, entire and reciprocal liberty of commerce and navigation between the citizens and subjects of the two High Contracting Parties". Unlike certain of the recently concluded reciprocal trade agreements into which the United States has entered, the treaty with Spain does not permit the laying "in exceptional circumstances" of an embargo on arms, military supplies, or materials needed in war.

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[1] Members of Congress themselves fully appreciated the fact that the Act was not a "neutrality" law, and the proposal that it should be cited as such was rejected. The proposal to cite it as the "Peace Act of 1937" was also rejected. No agreement between the two Houses having been reached on the matter the Act was passed without a title by which it is to be officially cited.

There is some reason therefore for holding that the present embargo on the shipment of arms, ammunition, and implements of war to the government of Spain is a violation of the treaty of 1902.[1] Mention may also be made of certain Pan-American treaties to which the United States is a party, such as the Argentine Anti-War Pact of 1933, the Montevideo Convention on the Rights and Duties of States, of December 26, 1933, and the Buenos Aires "Consultation" Conventions of December 23, 1936, all of which condemn wars of aggression, pledge the parties to consult with each other and to "adopt in their character as neutrals a common and solidary attitude" in the event of the outbreak of war in America. It is by no means clear how the carrying out of the policy laid down by the United States Neutrality Act can be reconciled with the spirit at least of these conventions.

It may be remarked in this connexion that the principle of equality of treatment of both or all belligerents alike in respect to embargoes and restrictions on the exportation of war supplies and the prohibition of financial loans, which is a feature of the Neutrality Act, found strong opposition among Latin-American states at the Buenos Aires Inter-American Conference in 1936 when the United States delegation laid before the Conference a proposal that all the American Republics accept the principles of the United States scheme of neutrality. The Latin-American Members of the League of Nations made it plain that they could not, in view of their obligations under the Covenant, bind themselves to treat covenant-breaking aggressors and their victims alike in the matter of embargoes and trade restrictions. Some of them felt, that quite apart from their duties under the Covenant, the very principle of equal treatment of opposing belligerents when one of them was an aggressor was fundamentally wrong and should not receive recognition in an international convention dealing with the rights and duties of neutral powers in time of war. As a result of the opposition the United States proposal in the form in which it was made completely failed of acceptance.[2]

The policy of recourse to embargoes on the exportation of arms and munitions is not a new one in the United States. By statutes passed in 1912 and 1922 the President was authorized to lay an embargo on the shipment of arms and munitions to any American or other country in which the United States exercised extraterritorial jurisdiction and in which conditions of domestic violence existed, if in his opinion it would contribute to the restoration of peace. In pursuance of these statutes embargoes have been laid in a number of instances on the exportation of arms and munitions to the rebel forces in Latin-American states in which revolutions existed. They differed in two respects, however, from the type of embargo provided for in the present neutrality Act. In the first place, they were not measures adopted for the purpose of preventing the United States from being drawn into a foreign war but were intended primarily to terminate existing revolutions and to discourage others. In the second place, they were not applied equally to the government and the rebel forces, but only to the latter.

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[1] See the criticism by the National Lawyers Guild, *National Lawyers Guild Quarterly*, Dec. 1937, pp. 53 *et seq.*

[2] See the details by Professor C. G. Fenwick, one of the United States delegates to the Conference, *American Journal of International Law*, April 1937, p. 214.

Embargoes on arms, munitions, and sometimes other war materials by various states during the World War, notably by Denmark, Norway, Sweden, the Netherlands, and Switzerland, were resorted to, not so much as neutrality measures as for the purpose of conserving the domestic stocks of the countries which laid them, and sometimes to enable them to bargain with the belligerents in order to obtain needed supplies from them. The embargo which President Wilson was authorized by Act of Congress in 1916 to lay, but which in fact he never resorted to, was intended to be a measure of retaliation against certain belligerents for their alleged unlawful interference with American trade. The fact is, no embargo was ever, prior to the enactment of the present law, authorized to be laid by the United States as a neutrality measure, that is, for the purpose of enabling the United States to avoid being drawn into a foreign war, and prior to the Chaco War of 1934 no embargo was ever authorized which was required to be applied equally and impartially to both or all belligerents. During the discussions in Congress on the present law, opposition to the principle of mandatory equality of application to both belligerents in all circumstances, was raised by various senators and representatives who pointed out that in particular cases it would operate in aid of aggressors and treaty-breakers and would also deprive the United States of the power which goes with a differential embargo to employ pressure against a particular belligerent who might be acting in disregard of the rights of the United States as a neutral. It was also pointed out that an embargo laid by the United States alone when other neutral powers declined to follow its example might have the result of causing

American trade to be diverted to those countries. A policy of joint co-operation with other neutral governments in the employment of embargoes was therefore desirable. In 1933 the Department of State submitted to the House Committee on Foreign Affairs a memorandum in support of these ideas, in the course of which it asserted that an embargo laid by the United States alone and without regard to the policy of other neutrals would be "fruitless and improper" and if applied equally to both belligerents when one was an aggressor it might encourage aggression and discourage common movements to prevent or repress it. There was also laid before the Committee a statement made by President Roosevelt on January 11, 1933, in which he was quoted as saying: "I have long been in favour of the use of embargoes on arms to belligerent nations, especially to nations which are guilty of making an attack on other nations—that is, against aggressor nations."[1] So strongly did these ideas appeal to members of Congress in 1933 that a resolution embodying them passed the House of Representatives on April 17. The Senate, however, amended the resolution so as to require any embargo laid in pursuance of it to "apply impartially to all the parties to the dispute or conflict to which it refers". But the House declined to concur in the Senate amendment and accordingly the resolution failed to become law. During the next two years sentiment in and out of Congress against the principle of a discriminating embargo increased under the influence of propagandist activity, and the Neutrality Act, which was passed in August 1935, required any embargo laid under its authority to be applied equally to both or all belligerents. And this requirement is repeated in the present law. The equality requirement is based on the fear that if the President were authorized to distinguish between the opposing belligerents, applying the embargo, for example, to an aggressor or treaty-breaker while permitting the exportation of arms freely to his victim, the danger of the United States becoming involved in the war would be too great to justify the risk. Those who were responsible for the character of the law in its present form frankly admit that the impartial embargo feature may involve a violation of principles of morality and justice, encourage aggression and handicap the efforts of the League of Nations or other organized movements in behalf of international peace, but it is their contention that the duty of the United States to refrain from any act, such as a discriminating embargo, which might draw it into a foreign war is greater than its duty to conform its conduct to the high moral and other considerations mentioned above.

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[1] From a letter published by Lord Robert Cecil in *The Times* and reproduced in *Hearings on H. J. Res. 93*, Com. on For. Rels., H. of R. 73rd Cong, 1st sess., 1933, p. 24.

Aside from these considerations it is believed also by many Americans that the present law is based on what in the long run may prove to be a short-sighted view, namely, that it is not for the United States to concern itself with the effort to prevent war from breaking out in another part of the world but rather to keep out of it when it has once begun to rage. If there were good reason for believing that a policy which offends against considerations of high morality and international policy would prove effective in safeguarding the neutrality and peace of the United States, it might be justified on the principle of national self-preservation, but the number of Americans whose opinions count in such matters who are fatuous enough to believe that it will accomplish this object is relatively small. Large numbers, although they are still perhaps numerically in the minority, believe that the wiser neutrality policy for the United States lies not in embargoes or restrictions on trade, financial transactions, and the right of Americans to travel on belligerent ships when war has once broken out but rather in a policy of joint consultation, co-operation, or other concerted measures for preventing the outbreak of wars, in which when they once come, no trade, travel, or financial restrictions short of complete isolation are likely to prove an effective form of insurance against the "involvement" of the United States.

It is interesting to note that the President in a notable speech at Chicago on October 5 repudiated the basic philosophy of the recent legislation, that a policy of isolation or neutrality through unilateral embargoes and trade restrictions affords the best guarantee against the United States being drawn into wars between other countries. Adverting to an international situation in which "the very foundations of civilization are seriously threatened" and warning the people of America that they must not expect to escape attack by those who have repudiated their treaty obligations and engaged in ruthless wars of conquest, he declared that "the peace-loving nations must make a concerted effort in opposition to those violations of treaties and those ignorings of humane instincts which to-day are creating a state of international anarchy from which there is no escape through mere isolation or neutrality". It is well known that he wishes to see the present law modified along the lines indicated in his speech, or repealed outright, but being aware that a proposal for its repeal or amendment would precipitate a bitter and long-drawn-out debate in Congress, which he wishes to avoid, it is doubtful if he will make any effort in this direction. So far as the carrying out of the policy embodied in the law is concerned it makes little difference, however, whether Congress repeals it or leaves it on the statute books, since the putting of it into effect is entirely dependent on the will of the President. His refusal so far to put it into effect during the present war between China and Japan and his known want of confidence in its utility indicate that it may be allowed to become virtually a dead letter.

But if he should by proclaiming the existence of war bring the Act into force, the going into effect of so many of its provisions is still dependent upon his decision or is subject to such exceptions, limitations, and conditions as he may prescribe, that we are safe in saying that within the limits of his constitutional powers the neutrality policy of the United States, so long as he is in office, will be largely what he chooses to make of it—unless, of course, the present law should be replaced by new legislation depriving him of the discretionary authority which it now confers upon him.

THE INTERPRETATION AND APPLICATION OF MUNICIPAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE

By C. WILFRED JENKS

I. *Introduction*

It is occasionally suggested that the functions of the Permanent Court of International Justice do not include the interpretation or application of municipal law. The practice of the Court does not support this view, and it is intended in the present article: (1) to examine critically the extent to which the Court has hitherto had occasion to interpret and apply municipal law; (2) to suggest further classes of cases in which the Court may have occasion to interpret or apply municipal law; (3) to review some of the special problems which arise in connexion with the interpretation and application of municipal law by the Court; and (4) to consider whether it is desirable that the Statute or Rules of Court should include any provisions relating to the consideration of municipal law by the Court. This article is not concerned with the development of international law by the Court on the basis of municipal law analogies or with the consideration by the Court of municipal decisions on points of international law. Its scope is limited to the interpretation and application by the Permanent Court of municipal law as the law which determines the existence of rights or obligations, or the effect of transactions, upon which the Court is called upon to adjudicate in the course of deciding international disputes or to express an opinion in the exercise of its advisory jurisdiction.

II. *The Extent to which the Court has already interpreted and applied Municipal Law*

A. *Cases in which the Court has interpreted or applied municipal law*

1. *Cases in which it is necessary for the Court to discuss municipal law for the purpose of determining its compatibility with an international engagement.* It is generally admitted that the determination of whether municipal laws are consistent with international law is an essential part of the function of any international court. Even an avowed critic of certain aspects of the application of municipal law by the Court, such as Judge Anzilotti,

goes so far as to say that "the Court has sovereign power of adjudication on this point".[1] There are, however, many cases in which the determination of whether municipal law is consistent with international law necessarily involves a certain degree of interpretation of the relevant municipal law as well as of international law. Thus in the *Wimbledon* case the Court, when considering the compatibility with Germany's obligations of the action taken under her Neutrality Orders, expressed the view that the action taken was not even justified by those orders on their proper interpretation.[2] Similarly in the *German interests in Polish Upper Silesia* case the Court, after observing that it was "certainly not called upon to interpret Polish law as such" but that there was nothing to prevent its giving judgment "on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention",[3] found it necessary to embark upon an exposition of the Polish law under discussion. It will be generally conceded that the line between exposition and interpretation is perilously indeterminate, and it would therefore seem to be a mistake to attach undue importance to the remark made by the Court in the same case that "from the standpoint of international law and the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of states, in the same manner as do legal decisions or administrative measures".[4] The Court has not drawn from this remark the conclusion that municipal laws must be proved as facts in the manner in which foreign law is generally required to be proved in an English court, and in subsequent cases it has clearly passed beyond the line which separates exposition from interpretation.

2. *Cases of state succession which involve questions of municipal law.* In a number of cases the Court has had to interpret municipal law for the purpose of determining the extent to which successor states are bound to respect obligations contracted by their predecessors in title. This is a type of case likely to be of particular importance, for in disputes as to state succession the kernel of the case often consists of differences of opinion as to the nature and validity, under the law by which they were originally created, of obligations alleged to be binding upon the successor state. Indeed the clearer the rules as to state succession

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[1] *Danzig Legislative Decrees Case*, *P.C.I.J.*, Series A/B, No. 65, p. 63.

[2] *P.C.I.J.*, Series A, No. 1, p. 29.

[3] *P.C.I.J.*, Series A, No. 7, p. 19.

[4] *Ibid.*, p. 19.

become, the greater will be the relative importance in state succession cases of classification problems involving a detailed consideration of the law under which rights and obligations are alleged to have arisen.

In the *German Settlers in Poland* case the Court observed "that German law is still in force in the territories ceded by Germany to Poland and that reference to German law is necessary in the examination of the nature and extent of the rights and obligations arising under these contracts".[1] From an examination of German law[2] the Court concluded that the rights before *Auflassung* of the holders of *Rentengutsverträge* are not inchoate rights unenforceable at law but a *jus ad rem* enforceable by legal proceedings, even where the seller is the state. It therefore held that the rights of the holder under a *Rentengutsvertrag* are, even before *Auflassung*, not of such a nature as to make his contract unenforceable against a successor state.[3] In order to reach this conclusion upon an international point, however, the Court had found it necessary to embark upon a lengthy exposition, necessarily involving an element of interpretation, of a branch of German law, that relating to the acquisition of land, which is regarded in most legal systems as peculiarly national.

In the *Mavrommatis Palestine Concessions* (*Merits*) case the question before the Court was whether the British Government had committed a breach of its international obligations by refusing to recognize the validity of M. Mavrommatis's concessions. One of the arguments for the British Government was that the Mavrommatis concessions were invalid *ab initio* on the ground that M. Mavrommatis was erroneously described in them as an Ottoman subject. The Court observed that this point arose "only as a preliminary question, and not as a point of law falling properly within its jurisdiction as an International Court"[4] and added that it was unnecessary in the case before it to decide the point since the British Government had produced no evidence that the concessions were invalid under Ottoman law. "For this reason", it declared, "the question does not, in the present case, arise as to whether the Court should, if necessary, ascertain what rule would actually have been applied by Turkish law to the situation under consideration." Later cases have now made it clear that when necessary the Court will not merely take steps to ascertain what rule would be applied by municipal law to a given situation, but will even itself settle a dispute as to the position under municipal law.

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[1] *P.C.I.J.*, Series B, No. 6, p. 29.

[2] *Ibid.*, pp. 29–34.

[3] *Ibid.*, p. 35.

[4] *P.C.I.J.*, Series A, No. 5, p. 29.

This is illustrated by the group of cases relating to *German Interests in Polish Upper Silesia* and to the *Factory at Chorzów.* In these cases Poland's liabilities as a successor state were in part determined by questions of German law, and in the *German Interests in Polish Upper Silesia* case the Court even states as a general principle that treaty provisions applying different rules of state succession to different classes of property necessarily imply a reference to the classification of property under the law of the state from which sovereignty was transferred. Thus the Court observes, apropos of Article 256 of the Treaty of Versailles, that "the article in question, which relates to the transfer of public property as a result of cessions of territory, must, in accordance with the principles governing state succession—principles maintained in the Treaty of Versailles and based on considerations of stability of legal rights—be construed in the light of the law in force at the time when the transfer of sovereignty took place".[1] A subsidiary Polish argument in this case was that the ownership apparently existing under German law at the time of the cession of the territory had not been validly acquired under German law. The Court indicated that, in view of the circumstances in which the case was before it, it was reluctant to discuss this issue, but, after stating that it did not regard the alienation of ownership by the Reich as internationally invalid as a violation of the duties of a state temporarily in possession of territory prior to cession, it added that it had not found in support of the Polish contention any "reasoning calculated to modify, from the standpoint of municipal law, the conclusion at which it has thus arrived on the basis of international law" and therefore concluded "that the Oberschlesische's right of ownership of the Chorzów Factory must be regarded as established, its name having been duly entered as owner in the land register".[2] A dispute subsequently arose as to whether it had been the intention of the Court to decide the question of ownership in municipal law or whether the Court had merely accepted entry in the land register as prima-facie evidence of ownership, leaving it still open to Poland to apply to the competent municipal court, now a Polish court, for a decision upon the question whether the entry in the land register was valid. Germany thereupon applied to the Court for an interpretation of its judgment. In its interpretative judgment the

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[1] *P.C.I.J.*, Series A, No. 7, p. 41.

[2] *Ibid.*, p. 42.

Court declared "that, by the aforesaid Judgment, the Court meant to recognize, with binding effect between the parties concerned and in respect of that particular case amongst other things, the right of ownership of the Oberschlesische Stickstoffwerke A.G. in the Chorzów Factory under municipal law".[1] The effect of this judgment is, however, liable to be exaggerated unless emphasis is laid on the fact that the Court only claims binding effect for its recognition of a right of ownership under municipal law "between the parties concerned" and in respect of the particular case. Since the parties were Germany and Poland and the case related to the question whether refusal to recognize the validity of the right of the Oberschlesische was consistent with Poland's international engagements, the Court's ruling only decided the question of ownership under municipal law for the purpose of determining whether there had been any breach of an international engagement. It did not amount to an attempt by the Court to adjudicate on the question of the rights of the Oberschlesische in such a way as to entitle the company to claim before a Polish court that its right of property was *res judicata* for the purpose of proceedings in that court. In fact the Polish Government brought such proceedings and obtained judgment by default in its favour. The question then arose whether, in subsequent proceedings before the Permanent Court concerning the reparation due from Poland to Germany in respect of the dispossession of the Oberschlesische, Poland was entitled to rely upon the municipal decision to support a contention that, as the Oberschlesische had never been lawful owner and had at all events ceased to be so since the municipal decision, it could not have suffered, at any rate after the date of that decision, any damage for which reparation should be made. The Court held that Poland was not entitled to rely upon the municipal decision for this purpose. It did not attempt to determine the effect of this decision in municipal law, but declared that for the purpose of assessing the reparation due it must abide by its own previous decision that the Oberschlesische was entitled to the factory under municipal law and that there had therefore been a breach of an international engagement.[2] The whole series of cases is an instructive commentary both on the manner in which the Court may find it indispensable to interpret and apply municipal law, and upon the difficulties and limitations involved in this process under current conditions.

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[1] *P.C.I.J.*, Series A, No. 13, p. 22. See also p. 20.

[2] *P.C.I.J.*, Series A, No. 17, p. 33.

In the *Lighthouses* case the French Government contended that the only question submitted to the Court was a question of Ottoman law since Greece had, by the terms of the Special Agreement, admitted her liability as a successor state if the concessionary contract in question was valid according to Ottoman law. The Greek Government, on the other hand, contended that the international question whether, if the contract was valid according to Ottoman law, Greece was bound by it as a successor state was also included in the terms of reference to the Court. The Court did not rely, for the purpose of determining this controversy, upon any suggestion that it could hardly have been the intention of the parties to refer to it a question which was purely one of Ottoman law. It would apparently have been prepared to deal solely with the question of Ottoman law if it had been convinced that the jurisdiction conferred upon it by the parties was limited to that question, but it took the view that it could best give effect to the intention of the parties by deciding both the question of Ottoman law and the question of international law.[1] After pointing out that under Ottoman law concessions were granted by contracts made by the government and that in certain circumstances legislative authorization of such concessionary contracts was necessary, the Court narrowed the question of Ottoman law to that of whether the concessionary contract in question had been validly authorized by a provisional or decree-law.[2] The Ottoman constitution restricted the power to make such laws to cases "of urgent necessity" in which legislation was necessary "for the protection of the State against some danger or for the preservation of public safety", and the Greek Government contended that there was no such necessity in the case of the decree-law under discussion. The Court held that "any grant of legislative powers generally implies the grant of a discretionary right to judge how far their exercise may be necessary or urgent", that "it is a question of appreciating political considerations and questions of fact, a task which the Government, as the body possessing the requisite knowledge of the political situation, is alone qualified to undertake", and that it follows "that the Ottoman Government, in the first instance, and, subsequently, the Turkish Parliament were alone qualified to decide whether a given decree should, or should not, be issued".[3] It was then necessary to consider a Greek contention as to the effect of a decree-law. The Greek view was "that the validity of the decree-law is subordinated to a condition by which it is annulled if the decree-law is not submitted to Parliament at the next session or if Parliament should refuse to ratify it". The Court rejected this view and held that "the decree-law was a form of legislation, imposing legal rules which are immediately valid and which only differ from ordinary laws in one respect, namely that they are issued by the Government, and that their validity may subsequently be terminated by a decision of Parliament". In the view of the Court "the existence of the latter possibility gives decree-laws a provisional character, but it does not affect the legal force they enjoy up till the time of their rejection by Parliament".[1] Ratification by Parliament was not necessary since "the refusal of Parliament to ratify would alone be relevant; when Parliament takes no action, the decree-law remains intact and continues in force, in the same way as any other ordinary law".[2] It was therefore irrelevant to argue, as the Greek Government had done, that when ratification was given it was a nullity since by that time Turkey had "lost territorial jurisdiction over the districts in question" by a formal cession. Nor, according to the Turkish law, was the decree-law itself tainted with nullity because some of the territories covered by the contract which it authorized were at the time of its enactment in enemy occupation. "In constitutional law", the Court observes, "nothing short of definite cession can produce legal effects prejudicing the rights of the lawful sovereign."[3] Here the Court seems to be enunciating a general principle of constitutional law, although in the previous sentence it had referred to the position under Turkish law. A feature of the case which is of special interest is that the Court undertook to interpret the constitutional law of a state which was not a party to the proceedings before the Court. There could hardly be clearer authority for the proposition that the Court will, when necessary, interpret and apply rules of municipal law. The Court shows itself to be conscious, however, that its role in relation to municipal law creates problems of some difficulty, and it is noteworthy that it avoided interpreting municipal provisions conferring discretionary powers on a public body in a manner which would have made it necessary for it to appreciate whether the conditions justifying the exercise of such discretionary powers existed.

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[1] *P.C.I.J.*, Series A/B, No. 62, pp. 13–17.

[2] *Ibid.*, p. 21.

[3] *Ibid.*, p. 22.

In the *Lighthouses* case the Court confined itself to deciding that Greece was liable under the concessionary contract as a matter of principle, and did not consider itself called upon to specify the territories in respect of which the contract was operative. There was subsequently referred to the Court by a new special agreement the question whether the contract was operative as against Greece in respect of lighthouses situated in Crete and Samos.[1] In this second case, the *Lighthouses in Crete and Samos* case, the majority of the Court took the view that the only question referred to the Court by the special agreement was whether Crete and Samos had been detached from Turkey before the Balkan wars; if they had, Greece was not subrogated by Lausanne Protocol XII in respect of contracts relating to them; if they had not, she was so subrogated and the decision in the *Lighthouses* case must be regarded as having determined conclusively that the contract was duly entered into. From this point of view the constitutional status of Crete and Samos was only relevant for the purpose of determining whether they had been detached from Turkey prior to the Balkan wars. The majority held, primarily on the basis of international instruments, that Crete and Samos had not been so detached, but the Greek Government contended that, whatever the effect of the international instruments, Crete and Samos had in fact enjoyed a régime of autonomy so wide that they must be regarded as having been detached from the Ottoman Empire prior to the Balkan wars. The majority rejected this contention on the ground that no confirmation for it was obtained by examination of either the Cretan Constitutions or the organic Statute of Samos.[2] The dissenting members of the Court took a wider view of the scope of the question submitted to the Court. While recognizing that the *Lighthouses* case had decided that the concessionary contract was "duly entered into" according to Ottoman law, the dissenting judges regarded the question whether the contract had been "duly entered into" in respect of Crete and Samos as being still an open one. In the view of these judges, therefore, it was necessary to consider the constitutional status of Crete and Samos not merely for the purpose of determining the date at which these territories were detached from the Ottoman Empire, but equally for the purpose of determining whether the contract had been "duly entered into" as regards lighthouses situated in them. Thus, Sir Cecil Hurst observed that "if it is to be assumed as a consequence of the finding by the Court in its judgment of 1934 that the said contract was duly entered into because it was duly entered into according to the Ottoman law in force at the time, it must be shown that the Ottoman law in question was also in force in Crete and in Samos at that time";[1] Jonkheer van Eysinga said of the finding in the *Lighthouses* case that the contract was duly entered into that "the Court had reached that decision by founding itself on the general constitutional law of the Ottoman Empire, but it had not expressed its opinion as to whether this general constitutional law was really operative in all the territories detached from the Ottoman Empire and assigned to Greece after the Balkan wars";[2] and Judge Hudson was of opinion that the contract could not be said to have been "duly entered into" as to lighthouses in Crete and Samos "unless it can be found that, notwithstanding the autonomy possessed by Crete and Samos, the Sultan or the Ottoman Government had legal power on April 1/14, 1913, to enter into concessionary contracts with reference to lighthouses in these territories".[3] It was accordingly necessary for these three judges to consider the extent of autonomy of Crete and Samos for the purpose of determining whether the contract had been "duly entered into" as to lighthouses in Crete and Samos according to the constitutional law in force there. It so happened that the status of these territories was in part governed by international instruments, but the case illustrates in a striking manner the difficult nature of the questions of constitutional law, and at times almost of constitutional convention, which it may be essential for the Court to determine for the purpose of deciding state succession cases. It is also of interest for the complete frankness with which Sir Cecil Hurst[4] and Jonkheer van Eysinga[5] recognized that the Court had determined questions of Ottoman law in the *Lighthouses* case.

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[1] *Ibid.*, p. 23.

[2] *Ibid.*, p. 24.

[3] *Ibid.*, p. 24.

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[1] *P.C.I.J.*, Series A/B, No. 71.

[2] *Ibid.*, at pp. 104–5.

In the *Peter Pázmány University* case it was necessary for the Court to consider, for the purpose of deciding whether the University was entitled to claim certain property before the Hungarian-Czechoslovak Mixed Arbitral Tribunal, the status of the University under Hungarian law and the nature of its legal rights in respect of certain landed property. In its decision the Court adopted a definite view upon important questions of Hungarian law. Upon the basis of its own examination of the relevant documents, it found it to be beyond doubt that the University enjoyed legal personality in Hungary in the late eighteenth and early nineteenth centuries.[6] It noted the absence of any legislative enactment or other measure subsequently abolishing the University's personality in law, and, without considering whether such personality could be abolished otherwise than by an express provision, declared that "such abolition could, in any case, only result if the provisions in force were found to be really incompatible with the possession of personality in law" and that "no such incompatibility has been proved and as a result of its investigation the Court has reached the conclusion that no such incompatibility exists".[1] Having thus determined for itself that the University possessed legal personality under Hungarian law, the Court construed a clause found in all the deeds of donation to the University,[2] referred to the effect under Hungarian law of entries in land registers,[3] and satisfied itself that in certain Hungarian enactments the term "University Fund" is employed "to denote the University regarded as a juridical person, the holder of property rights".[4] On the other hand the Court avoided discussing questions of municipal law the determination of which was not essential for the decision of the case. Thus it declared it unnecessary to consider whether under Hungarian law personality in law can be abolished otherwise than by an express provision,[5] and refrained from discussing whether the University is in general entitled to sue without proceeding through the Board of Public Foundations.[6] The Court also appears to have adopted the principle that if it can dispose of an aspect of a case either by deciding a point of municipal law or by deciding a point of international law it will decide the point of international law. Thus it refrained from considering a suggestion that under Hungarian law the property in dispute was "public property" which Czechoslovakia was therefore entitled to retain, and preferred to decide the matter on the footing that, on the proper interpretation of the Treaty of Trianon, Czechoslovakia would not be entitled to retain the property even if the contention as to its being "public property" were well founded.[7] The case is also of interest for the manner in which the Court deals with points which it regards as unsuitable to be raised before it and a matter for municipal proceedings. Czechoslovakia contended that under Hungarian law the University itself could not submit any claim, but must act through the Board of Public Foundations. One can imagine a possible but unconvincing answer to this, that any such limitation upon the procedural capacity of the University was purely a matter of municipal law which could not restrict the right of the University to claim the property before an international tribunal. The Court refrained from formulating any such artificial distinction between the municipal and international capacity of the University and pointed out that, whatever restrictions upon its procedural capacity there might be, the purpose of such restrictions, the maintenance of the integrity of its property, was in no way defeated by the recognition of the right of suit in the present case.[1] Even if it were true, as Czechoslovakia had contended, that the University was only a usufructuary of property belonging to the University Fund, it would be entitled as usufructuary to restitution of the property and "any questions which might arise between owner and usufructuary would fall within the jurisdiction of the municipal courts".[2] Likewise, even if the effect of the decision should be to grant the University rights more extensive than it enjoyed when the Czechoslovak Government took possession of the property, any dispute "as to the limits of the rights of ownership or administration of the property in question falls within the jurisdiction of the municipal courts".[3] The Court did not regard itself as debarred from giving judgment between the parties before it on the ground that it could not in its judgment consider the possible rights of third parties for whom redress would be available in municipal courts.

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[1] *Ibid.*, at p. 109.

[2] *Ibid.*, at p. 113.

[3] *Ibid.*, at p. 125.

[4] *Ibid.*, at p. 108.

[5] *Ibid.*, at p. 113.

[6] *P.C.I.J.*, Series A/B, No. 61, p. 229.

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[1] *P.C.I.J.*, Series A/B, No. 61, pp. 230–31.

[2] *Ibid.*, p. 234.

[3] *Ibid.*, pp. 234–5.

[4] *Ibid.*, p. 235.

[5] *Ibid.*, p. 230.

[6] *Ibid.*, p. 232.

[7] *Ibid.*, pp. 236–8.

3. *Differences of opinion on questions of municipal law between a state exercising its right of diplomatic protection and another state, which are submitted to the Court by special agreement.* The *Serbian* and *Brazilian Loans* cases have made it clear that there is nothing to prevent governments from submitting to the Court by special agreement a difference of opinion on a question which is purely one of municipal law between a state exercising its right to extend diplomatic protection to its nationals and another state. In the *Serbian Loans* case[4] the Court pointed out that though the relations which formed the subject-matter of the dispute were, in themselves, within the domain of municipal law, they had become the subject of a difference of opinion between two governments and the dispute was therefore within the jurisdiction of the Court *ratione personae.* The only point on which there might be doubt was "whether the actual subject of the dispute referred to the Court, which relates only to questions of fact and of municipal

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[1] *P.C.I.J.*, Series A/B, No. 61, p. 232.

[2] *Ibid.*, p. 233.

[3] *Ibid.*, p. 248.

[4] *P.C.I.J.*, Series A, Nos. 20/21, pp. 18–20.

law, prevents the Court from dealing with it". The Court admitted that "From a general point of view . . . the true function of the Court is to decide disputes between States or Members of the League of Nations on the basis of international law", but it was not disposed to admit "that only questions of international law may form the subject of a decision of the Court" and emphasized that the Statute contemplated it having compulsory jurisdiction in "disputes concerning pure matters of fact". It therefore concluded that there was nothing to prevent states from conferring jurisdiction upon it by special agreement in disputes relating to questions of municipal law. "Article 38 of the Statute", the Court said, "cannot be regarded as excluding the possibility of the Court's dealing with disputes which do not require the application of international law, seeing that the Statute itself expressly provides for this possibility. All that can be said is that cases in which the Court must apply international law will, no doubt, be the more frequent, for it is international law which governs relations between those who may be subject to the Court's jurisdiction." In the *Brazilian Loans* case[1] the Court reaffirmed this position. In the *Serbian Loans* case the Court also had to consider whether, in a case which was in form a controversy between France and the Serb-Croat-Slovene State but which in fact related exclusively to a *nexus* of municipal law between the Serb-Croat-Slovene state as borrower and the holders of certain Serbian loans, "facts of a character which would determine the relations under international law between the two states may also have an effect upon the relations under the municipal law upon which the Court, at the request of these states, has to give judgment. . .".[2] The Court's conclusion was that facts opposable against the French Government but not against the bondholders were excluded from the question submitted to it. By adopting this view it emphasized the formal nature of the requirement that disputes submitted to it must be disputes between states and narrowed the issues in the case so as to exclude all questions of international law.

4. *Cases in which the Court has to interpret constitutional arrangements which are guaranteed by the League of Nations or form the subject of a treaty engagement.* Questions of constitutional law are particularly likely to come before the Court in connexion with constitutional arrangements which, though not in the form of a treaty, are guaranteed by the League of Nations, and in

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[1] *P.C.I.J.*, Series A, Nos. 20/21, p. 101.

[2] *Ibid.*, p. 20.

connexion with constitutions in treaty form. The two types of case raise questions which differ somewhat in character, but in both types the Court tends to become, in effect if not in form, the court with final jurisdiction in respect of constitutional issues. Whatever may be the political future of the areas where such arrangements now exist, similar formulae are likely to be resorted to from time to time in the future.[1] This type of jurisdiction may therefore be expected to be of permanent if of variable importance, and the cases relating to the constitutions of Danzig and Memel are consequently of more than transient interest.

In the *Case concerning the Treatment of Polish Nationals in Danzig*, the Court was asked by the Council to answer a question as to the meaning of the Constitution of the Free City only if it should find that Poland was entitled to invoke the provisions of the Danzig Constitution before the High Commissioner as conferring rights upon Polish nationals. The Court held that "with regard to Poland, the Danzig Constitution, despite its peculiarities, is and remains the Constitution of a foreign State",[2] with the result that a grievance arising out of the application of the Danzig Constitution is not a matter which can be submitted to the High Commissioner by Poland unless the Constitution has been applied in such a manner as to result in the violation of an international obligation incumbent on Danzig towards Poland, either under treaty stipulations or under general international law. The Court, therefore, made no attempt to interpret the Constitution of Danzig. It should be noted that this case in no way implies that the Court may not have functions of importance in connexion with the interpretation and application of instruments such as the Constitution of Danzig. It simply decides that, where such a constitution is not itself a treaty, the fact that it has been adopted in virtue of the provisions of a treaty and is placed under the guarantee of the League of Nations does not give its provisions the character of an international obligation of the area concerned towards the state in the interest of which the constitution has been framed which that state may invoke before bodies established to deal with differences arising under the instruments which govern the special relationships between that state and the area to which the constitution applies.

In the *Danzig Legislative Decrees* case the Court was asked for an advisory opinion upon a question which was purely one of Danzig constitutional law. The Senate of the Free City had promulgated decrees relating to criminal law and procedure the general effect of which was to substitute for a penal system based on the conceptions *Nullum crimen sine lege* and *Nulla poena sine lege* a penal system based on the theory that any act which "according to the fundamental idea of a penal law and according to sound popular feeling" deserves punishment should, where there is no particular penal law applicable to the act, "be punished in virtue of the law whose fundamental conception applies most nearly".[1] The question submitted to the Court was whether this change in the penal system was compatible with the Constitution. Before proceeding to discuss this question the Court alluded to the basis upon which it accepted jurisdiction in such a case in the following terms:

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[1] See for instance the Statute and Fundamental Law of Alexandretta, *League of Nations Official Journal*, 18th Year, Nos. 5–6, May–June 1937, at pp. 580–9.

[2] *P.C.I.J.*, Series A/B, No. 44, p. 24.

> "It is clear that, though the interpretation of the Danzig Constitution is primarily an internal question of the Free City, it may involve the guarantee of the League of Nations as interpreted by the Council and by the Court. It is also clear that, when the constitutionality of decrees issued by the Senate is challenged this may raise questions the solution of which depends upon the interpretation of the constitution. It follows that a petition like the petition submitted to the High Commissioner on September 4th, 1935, by certain political parties in Danzig necessarily involves the League's guarantee of the Danzig Constitution. This suffices to establish the international element in the problem raised by the petition which led up to the Council's Resolution asking for an advisory opinion. This element is not excluded by the fact that, in order to give the opinion for which it is asked, the Court will have to examine the municipal legislation of the Free City, including the Danzig Constitution."[2]

More briefly put, there is a sufficient international element to justify the Court in giving an advisory opinion in any case in which the Court is asked to interpret a constitution in order to facilitate the performance by the Council of its functions as guarantor of that Constitution. The Court therefore proceeded to interpret the Constitution and held it to be that of a *Rechtsstaat*.[3] It held that the word "law", in various provisions of the Constitution which permit restrictions on the liberties conferred on individuals to be imposed by law, means "not merely a legislative act, but also one the terms of which are in conformity with the Constitution and which, in particular, respects the principles on which the Constitution is based".[4] In view of the fundamental rights accorded to individuals by the Constitution "the rule that a law is required in order to restrict the liberties provided for in the Constitution . . . involves the consequence that the law must define the conditions in which such restrictions of liberties are imposed".[1] Otherwise a law could, by simply giving a judge power to deprive a person of his liberty, make the Constitution entirely nugatory. The effect of the decrees under discussion was to "transfer to the judge an important function which owing to its intrinsic character, the Constitution intended to reserve to the law so as to safeguard individual liberty from any arbitrary encroachment on the part of the authorities of the State".[2] The decrees were therefore inconsistent with the Constitution. Three judges dissented from the Court's opinion, two because they did not regard the decrees as inconsistent with the Constitution on the grounds adopted by the Court, a third, Judge Anzilotti, because he did not believe the Court should have given an opinion upon a question which was purely one of Danzig constitutional law. Judge Anzilotti admitted that the Court had often had to decide the meaning and scope of a municipal law, but he believed that it should undertake to do so "only if and in so far as this is necessary for the settlement of international disputes, or in order to answer questions of international law".[3] In his view "The interpretation of a municipal law as such and apart from any question or dispute of an international character is no part of the Court's functions". From this general proposition few are likely to dissent, but the point at issue was whether the interpretation of a constitution guaranteed by the League for the purpose of enabling the League to exercise its guarantee is not a question of an international character. Surely to declare that the Court is not an "organ" of such a constitutional system, as Judge Anzilotti does,[4] is to attempt to square with a particular theory of the relation between international and municipal law a new development the effect of which is to bridge the gap between the two in such a way as to make that theory inapplicable. One of the objects of placing a constitution under international guarantee is to make the interpretation of that constitution a matter which, in the last analysis, is one for an international body, and there appears to be no good reason why that body should not be the Court.

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[1] *P.C.I.J.*, Series A/B, No. 65, p. 51.

[2] *Ibid.*, p. 50.

[3] *Ibid.*, p. 54.

[4] *Ibid.*, p. 56.

In the *Case concerning the Interpretation of the Statute of the Memel Territory* the Court had to consider arguments as to the character of the Statute of Memel which forms Annex I to the

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[1] *Ibid.*, p. 56.

[2] *Ibid.*, p. 56.

[3] *Ibid.*, p. 61.

[4] *Ibid.*, p. 64.

1924 Convention between the British Empire, France, Italy, and Japan of the one part, and Lithuania of the other part. Lithuania drew attention to the fact that the Statute was in form a Lithuanian enactment and had been enacted as a Lithuanian law, and therefore submitted that it should be regarded and interpreted as such. The Four Powers contended that while for internal purposes the Statute might be considered as forming part of the law of the Republic, it was for the Court only a part of a treaty. In its judgment the Court stated that "for the purpose of the present proceedings" it felt "no doubt that, according to the very terms of Article 16 of the Convention, the Statute of Memel must be regarded as a conventional arrangement binding upon Lithuania, and that it must be interpreted as such".[1] The Court found the answer to the first and main question submitted to it in the Convention and its annexes and was therefore in a position to remark that it was "unnecessary to consider the extent to which the constitutions of other countries can be used as a guide interpreting the Statute of Memel".[2] In reference to a later question as to whether the Chamber of the Territory had been properly dissolved, the Court, after concluding that the dissolution had been improper, continued:

> "The Court thinks it well to add that its function in the present case is limited to that of interpreting the Memel Statute in its treaty aspect. It has arrived at the conclusion that on the proper construction of the Statute the Governor ought not to have taken certain action which he did take. It does not thereby intend to say that the action of the Governor in dissolving the Chamber, even though it was contrary to the treaty, was of no effect in the sphere of municipal law. This is tantamount to saying that the dissolution is not to be regarded as void in the sense that the old Chamber is still in existence, and that the new Chamber since elected has no legal existence. The Court is satisfied that that was not the intention of the Four Powers when they submitted point 6 to the Court."[3]

The Court thus appears to countenance the propositions that "a constitution in treaty form", to quote the happy phrase used in a joint opinion by four dissenting judges,[4] can be subject to different rules of interpretation before international and national bodies and can operate in such a way that action under the constitution which is a violation of it in its treaty aspect can be effective in the sphere of municipal law. The case is, however, in many ways an unsatisfactory one. Five judges dissented, though Judge Van Eysinga alone dissociated himself from the suggestion that action which was a violation of the Constitution in its treaty aspect could be effective in the sphere of municipal law.[1] Judge Anzilotti, though voting with the majority, appears to have thought that the Court should have declined to give an opinion in the circumstances of the case.[2] Nor can there be any doubt that for all practical purposes the Court did interpret the constitutional law of the Memel Territory. It decided that there were circumstances in which the Governor of the Territory was entitled to dismiss the President of the Directorate.[3] It deduced "from consideration of the broad lines of the régime which the Statute intended to introduce in Memel" that dismissal of the President of the Directorate by the Governor does not by itself involve the termination of the appointment of the other members of the Directorate.[4] It decided that, in order "to give effect to what the Court considers to have been the intention of the Statute", it must be recognized that "a Directorate which has never enjoyed the confidence of the Chamber is not entitled to consent to dissolve the latter", although the text of the Statute makes no such distinction.[5] The Court therefore made an important contribution to the development of the constitutional law of the Memel Territory. It was idle for it to insist that it was only concerned with a treaty. It was concerned with an instrument which was simultaneously a treaty and a constitution. It is perhaps permissible to suggest that its opinion would be more convincing if the implications of the existence of this type of instrument had been more frankly faced. The real problem before the Court was not whether it should interpret such an instrument in its character as a treaty according to the rules of treaty interpretation or in its character as a constitution in the light of comparative constitutional practice, but that of the respective weight to be attached to these materials for interpretation in the case of a constitution in treaty form which can only be interpreted as an instrument which is simultaneously a treaty and a constitution. It is equally unfortunate that, for the purpose of indicating that it did not consider that there had been referred to it the question of whether the fact that the Chamber had been improperly dissolved implied that the elections held after such a dissolution were invalid, the Court should have formulated a distinction between the international propriety of such a dissolution and its effect in municipal law. A more defensible distinction would have been that between the propriety of such a dissolution and its effect, it being admitted that under a constitution in treaty form the traditional distinction between international propriety and municipal effect is inapplicable.

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[1] *P.C.I.J.*, Series A/B, No. 49, p. 300.

[2] *Ibid.*, p. 320.

[3] *Ibid.*, pp. 336–7.

[4] *Ibid.*, p. 341.

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[1] *Ibid.*, p. 338.

[2] *Ibid.*, pp. 347–56.

[3] *Ibid.*, pp. 312–20.

[4] *Ibid.*, pp. 321–3.

[5] *Ibid.*, p. 335.

B. *Cases in which the Court has held municipal law or particular provisions of municipal law inapplicable or irrelevant*

There have been a few cases in which the Court has specifically held that municipal law had no application to the matters before it for determination.

In the *Exchange of Greek and Turkish Populations* case the Court had to consider a contention that the convention relating to the exchange of populations, when referring to persons "established" in Constantinople, means established in the sense in which the term is used in Turkish law. The Court considered the circumstances in which the term was included in the convention and concluded that there was nothing to indicate that the authors of the convention intended a reference to national legislation, but admitted that if nationality had been the criterion it would have been impossible to determine the national status of a person except by reference to the law of the state in relation to which his national status was under discussion.[1] The decision must therefore be regarded as an *arrêt d'espèce* which does not preclude the possibility that in some future case the Court may hold that some other treaty is to be interpreted in the light of the conceptions of some particular legal system. Such a ruling would not be unreasonable if the parties to the treaty had a common legal system and used in the treaty terms with a technical meaning in the law common to them.

In the *Chorzów Factory* (*Merits*) case the question arose whether Germany's claim for reparation was based upon a Polish obligation to compensate the Oberschlesische and Bayerische Companies, or upon a Polish obligation to make reparation to Germany for a breach of the Geneva Convention of 1922, and the Court held the second to be the correct basis of the claim. This involved the conclusion that "the rules of law governing the reparation are the rules of international law in force between the two states concerned, and not the law governing the relations between the state which has committed a wrongful act and the individual who has suffered damage".[2] The importance of this principle in relation to claims cases is obvious.

The decision of the Court in the *Jurisdiction of the Danzig*

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[1] *P.C.I.J.*, Series B, No. 10, p. 19.

[2] *P.C.I.J.*, Series A, No. 17, p. 28.

Courts (*Transferred Railway Officials*) case was that the provisions of the *Beamtenabkommen* between Poland and Danzig were among the provisions of Polish law the application of which by the Danzig Courts to the relations between the Polish Railways Administration and officials transferred from Danzig Poland was under an international obligation to recognize. One of the contentions advanced on behalf of Poland was "that the Danzig Courts could not apply the provisions of the *Beamtenabkommen* because they were not duly inserted in the Polish National Law", but the Court rejected this contention by observing that Poland "could not avail herself of an objection which, according to the construction placed upon the *Beamtenabkommen* by the Court, would amount to relying upon the non-fulfilment of an obligation imposed upon her by an international engagement".[1] It would appear, therefore, that if a state has failed to give the force of municipal law to provisions to which it is under an international obligation to give such force, it will not be entitled to rely on its failure in proceedings in which an international tribunal (or a tribunal of another state) has occasion to apply its law to certain transactions. In such proceedings the international or foreign tribunal will be entitled to apply the law of that state as that law would have been if the international obligation had been performed.

The references to municipal law in the *Lotus* case relate primarily to the value of municipal decisions as authorities upon points of international law, but two points were raised which are more relevant to the present discussion. For the purpose of answering the question submitted to the Court, which was whether Turkey had acted in conflict with the principles of international law by instituting joint criminal proceedings under Turkish law against M. Demons, it was unnecessary to consider the general position as regards the assumption of criminal jurisdiction in respect of acts committed by foreigners outside the national territory. A ruling on the question of criminal jurisdiction over foreigners in collision cases was sufficient to dispose of the case and the Court refused to decide wider issues. It declined to discuss either a French argument that the Turkish Criminal Court had claimed jurisdiction under Article 6 of the Turkish Penal Code and that this article asserts a wider jurisdiction over criminal acts committed by foreigners abroad than is permitted by international law, or Turkey's reply that the article is in conformity with the principles of international law.[1] It would appear from its decision that, if it is merely asked whether the fact of the application of a municipal legal provision in a certain case is contrary to international law, the Court will not consider the compatibility with international law of the municipal legal provision as such, apart from the question of the effect of its application in the particular case, even though the theory upon which the municipal legal provision is applied in that case is a theory inconsistent with international law and there is no municipal legal provision applicable to the case which is based on a theory consistent with international law. The second point was whether the Court should consider whether the nature of the offence of manslaughter was such that the offence can be localized at the spot where the effect is felt. As the basis on which the Court held that Turkey had committed no violation of international law in assuming jurisdiction was the qualified territorial principle that jurisdiction may be claimed in respect of offences producing their effect upon the national territory, the point was a moot one. One would have thought that this principle could only apply to offences capable of such localization, and which are in fact regarded as so localized by the law of the state claiming jurisdiction, but the Court did "not feel called upon to consider this question, which is one of the interpretation of Turkish Criminal Law".[2] It contented itself with observing "that no argument has been put forward, and nothing has been found, from which it would follow that international law has established a rule imposing on States" any particular conception of manslaughter. It was thus unnecessary to discuss the suggestion that the absence of any culpable intent directed towards the territory where the mortal effect is produced makes it impossible to regard the offence of manslaughter as localized in that territory for the purpose of conferring jurisdiction. If the same point should arise again in any future case the Court ought, it is submitted, to consider the nature of the offence committed under the law of the state claiming jurisdiction, with a view to deciding whether the offence can be regarded as having been committed at the place where it took effect.

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[1] *P.C.I.J.*, Series B, No. 15, pp. 26–7.

III. *Further Classes of Cases in which the Court may have to interpret or apply Municipal Law*

There is no reason to suppose that the experience already acquired by the Court indicates exhaustively the types of case in which it may be required to interpret and apply municipal law. Indications as to other types of situation in which the Court may find it necessary to have recourse to municipal law are to be found in the decisions of other international tribunals, though it is of course impossible to judge to what extent the Court will follow such decisions. Thus the Court may find it necessary to have recourse to municipal law for the purpose of determining the nationality of a person on whose behalf a claim is advanced.[1] For the purpose of determining whether a claim has remained continuously national it may be necessary for it to consider whether the persons on whose behalf the claim is advanced are entitled to recover as heirs, executors, or assigns, an inquiry which may involve reference to the law of succession, bankruptcy, &c., either of the claimant state[2] or of the state against which the claim is made.[3] Difficult points relating to the interpretation of municipal law may come before the Court in connexion with the local remedies rule in cases in which it is disputed whether there were under the local law remedies which were not exhausted.[4] In cases in which denial of justice is alleged, the essence of the allegation of denial of justice may be a charge that there has been failure to apply the local law, and for the purpose of judging whether there has been such failure it may be necessary to interpret that law.[5] There may also be allegations that the manner in which the local law has been interpreted by the local courts is itself a denial of justice.[1] It may be necessary for the Court to consider the nature under the local law of an act from which international responsibility is alleged to arise,[2] either for the purpose of determining whether that act comes within particular treaty provisions or for the purpose of determining whether in the absence of such provisions it will create any liability. Reference to municipal law may be particularly necessary in the case of international claims arising out of contracts. There may be a question whether a contract out of which a claim is alleged to arise was validly concluded under the local law,[3] and in the case of concessionary contracts discussion of their validity may involve the consideration of constitutional requirements.[4] The nature under municipal law of a particular contract,[5] or the right of a principal to sue on his agent's contract under a particular legal system,[6] may also be relevant in international proceedings.

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[1] *P.C.I.J.*, Series A, No. 10, pp. 15 and 24.

[2] *Ibid.*, p. 24.

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[1] Cf. *Portuguese Expropriated Religious Properties* case, Scott, *Hague Court Reports*, Second Series, pp. 8–28; *Radziwill* v. *Germany*, *Annual Digest*, 1925–6, Case No. 174; *Mary Barchard Williams* v. *Germany*, *Annual Digest*, 1925–6, Case No. 177; *Georges Pinson* case, *Annual Digest*, 1927–8, Cases 4 and 304; *Carlos Klemp* case, *A.J.I.L.*, Vol. XXIV, 1930, p. 620.

[2] Cf. *Captain Gleadell's* case, *A.J.I.L.*, Vol. XXV, 1931, p. 762; *W. C. Greenstreet, Receiver of the Burrowes Rapid Transit Company* case, *Annual Digest*, 1929–30, Case 114.

[3] Cf. *Ruth Mabel Raeburn* case, *A.J.I.L.*, Vol. XXVIII, 1934, p. 387.

[4] Cf. *Finnish Ships* case, Award of Judge Algot Bagge; *Inter-Oceanic Railway of Mexico* case, *A.J.I.L.*, Vol. XXVIII, 1934, p. 167. It would have been necessary for the Permanent Court to consider Yugoslav law in this connexion if the *Losinger & Co.* case had proceeded to judgment, *P.C.I.J.*, Series A/B, Nos. 67 and 69; likewise the Court might have had to consider Spanish law in the *Borchgrave* case if the second preliminary objection of the Spanish Government had not been withdrawn, *P.C.I.J.*, Series A/B, No. 72.

[5] Cf. *In the Claim of Walter Fletcher Smith* v. *The Compañia Urbanizadora del Parque y Playa de Marianao*, *A.J.I.L.*, Vol. XXIV, 1930, p. 384; *Elvira Almaguer* v. *The United Mexican States*, *A.J.I.L.*, Vol. XXIV, 1930, p. 624; *Lillian Greenlaw Sewell* v. *The United Mexican States*, *A.J.I.L.*, Vol. XXVI, 1932, p. 419; *Jane Joynt Davies and Thomas W. Davies* v. *The United Mexican States*, *A.J.I.L.*, Vol. XXVI, 1932, p. 630; *The United States of America, On Behalf of Marguerite de Joly de Sabla* v. *The Republic of Panama*, *A.J.I.L.*, Vol. XXVIII, 1934, p. 602.

Further types of cases in which the Court may have occasion to apply municipal law are suggested by current developments in connexion with international institutions. Thus there may be a development of the practice of establishing international funds with juridical personality by international instruments which specify some particular municipal law as a residuary law which is to govern the fund in respect of matters not dealt with in the instruments constituting it. Instruments establishing such funds are likely to confer jurisdiction upon the Court,[7] and in exercising such jurisdiction the Court may be called upon to interpret the municipal law which is the residuary law of the fund. Likewise, in cases in which a corporate body of an international character has been created in accordance with the terms of international instruments by a charter granted under the law of a particular state,[8] the law of that state may become relevant in proceedings before the Court between the parties to the international instruments. Nor is it impossible that there will some day be referred to the Court for an advisory opinion some transaction entered into by the League of Nations or International Labour Organization which must be regarded, in view of special circumstances, as governed by a particular system of municipal law.[1]

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[1] Cf. *Martini* case (*1930*), *A.J.I.L.*, Vol. XXV, 1931, p. 554.

[2] Cf. *Norwegian Claims* case, Scott, *Hague Court Reports*, Second Series, p. 40.

[3] Cf. *In re Rio Grande Irrigation and Land Co. Ltd.*, *Annual Digest*, 1923–4, Case No. 98; *Iraq Petroleum Co. Ltd.*, v. *German Bank and Discount Co.*, *Annual Digest*, 1929–30, p. 501.

[4] Cf. *Great Britain* v. *Costa Rica* (*Tinoco Claims* case), *Annual Digest*, 1923–4, Case No. 95; *United States of America* (*on behalf of P. W. Shufeldt*) v. *Republic of Guatemala*, *A.J.I.L.*, Vol. XXIV, 1930, p. 799.

[5] Cf. *Mary Federer* v. *Austria* (*Wiener Bank Verein*), *A.J.I.L.*, Vol. XXIV, 1930, 181.

[6] Cf. *George W. Cook* v. *The United Mexican States*, *A.J.I.L.*, Vol. XXIV, 1930, p. 398.

[7] For instruments of this type already conferring such jurisdiction see those relating to Fund A and Fund B in Hudson, *International Legislation*, Vol. V, at pp. 462–75.

[8] For instruments providing for such charters see those relating to the Bank for International Settlements (Hudson, *International Legislation*, Vol. V, pp. 307–35) and to the suggested International Agricultural Mortgage Credit Company (*ibid.*, pp. 959–1003).

By giving a free rein to speculation the list of possible types of case could be made much longer, but it is not believed that such speculation would serve any immediately useful purpose. The types of case already mentioned afford sufficient evidence that recourse to municipal law has been a common feature of the experience of other international tribunals to create a strong presumption that the extent to which the Court has been called upon to consider municipal law has not been the result of any unusual series of accidents, but has been simply the inevitable reflection of the complexity of the legal relationships with which international tribunals are ordinarily required to deal.

IV. *Some Special Problems*

1. *Proof of municipal law*

Despite the suggestion contained in the *German Interests in Polish Upper Silesia* case that "municipal laws are merely facts which express the will and constitute the activities of States", the Court has not developed any body of rules requiring municipal law to be proved as a fact in the manner in which foreign law is proved in an English court. Nor has it ever discussed as a matter of principle the nature of the proof of municipal law which it will require, though it has observed that "the Court, which is a tribunal of international law, and which, in this capacity, is deemed itself to know what this law is, is not obliged also to know the municipal law of the various countries", and may therefore be obliged to obtain knowledge regarding the municipal law which has to be applied "either by means of evidence furnished it by the parties or by means of any researches which the Court may think fit to undertake or to cause to be undertaken".[1]

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[1] Many contracts entered into by the League are not subject to municipal law. Thus a Committee of Jurists appointed by the Assembly has said in reference to officials that "The legal relationship which exists between them and the Secretariat, the International Labour Office or the Registry, as the case may be, is not a legal relationship of private law within the meaning of the civil law of any country" but has also asserted that "the nature of the relationship is contractual". See *League of Nations Official Journal*, Special Supplement 107, Records of the Thirteenth Ordinary Session of the Assembly, Minutes of the Fourth Committee. It is sometimes specially provided that agreements between the League and a private company shall be interpreted "in accordance with the general principles of law". See the Agreement Relating to the League Radio Station, Article 12 (3) (Hudson, *International Legislation*, Vol. V, p. 500).

As regards the evidence which the parties may furnish of municipal law the Court has laid down no definite rules. It has allowed the filing of legal opinions by jurisconsults in the same manner as in international cases and has not formulated any requirement that such opinions should be by persons with special experience (or even knowledge) of the municipal law under discussion. Nor has the Court required that counsel who argue questions of municipal law before it should have special experience of the law under discussion.[2] There are, however, a number of small points in the cases which are of some interest. Thus in the *German Interests in Polish Upper Silesia* case the Court appears to suggest that it will accept an entry in a land register as conclusive upon a question of title to property unless the entry has been annulled by a competent tribunal,[3] though in view of the subsequent proceedings in the case relating to the interpretation of this judgment,[4] the precedent is a somewhat confused one and its value as a precedent is qualified by a fuller discussion of land registers in the *Peter Pázmány University* case in which the Court arrived at a rather different result.[5] In the *Serbian Loans* case the Court mentions in passing the opinions by French writers which had been cited by both parties,[6] but in view of its decision that it must follow the decisions of the Court of Cassation it was unnecessary for it to consider what value these opinions might otherwise have had. In the *Lighthouses* case the Court referred to legal opinions by a Turkish lawyer annexed to the French case and counter-case for the purpose of showing that in Turkish constitutional practice the field of extraordinary legislation had been a very wide one, but it appeared to attach some importance to the fact that the contents of these opinions had not been contested by the Greek Government.[7] The *Lighthouses* case is also of interest for three distinct references to the authority of translations submitted to the Court. In the case of one Turkish law the Court cites "the complete official translation produced to the Court by the Greek

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[1] *Brazilian Loans* case, *P.C.I.J.*, Series A, Nos. 20/21, p. 124.

[2] For an argument before the Court by an English lawyer relating to a considerable extent to questions of German law see *P.C.I.J.*, Series C, No. 3, Vol. III, Tome 1, at pp. 496–592 and 700–19.

[3] *P.C.I.J.*, Series A, No. 7, p. 42.

[4] *P.C.I.J.*, Series A, No. 13, pp. 16–20.

[5] *P.C.I.J.*, Series A/B, No. 61, pp. 234–5.

[6] *P.C.I.J.*, Series A, Nos. 20/21, pp. 45–6.

[7] *P.C.I.J.*, Series A/B, No. 62, p. 22.

Government";[1] in that of another it refers to "a translation, from a Turkish official source, submitted by the Greek Agent" which has "encountered no objection on the part of the French Agent";[2] whereas in the case of the Ottoman Constitution the reference is to the "(French) translation which the Parties have agreed to accept".[3] One is inclined to wonder whether official authentication by an appropriate organ of the state the law of which is in question is not a better test for the admissibility of translations of municipal laws than the agreement of the parties to the pending case to accept a particular translation. It is, however, the *Peter Pázmány University* case which presents the greatest interest in connexion with the proof of municipal law which the Court will require and the weight which it will attach to different forms of proof. In this case the Court mentioned in its judgment, and presumably attached some weight to, the fact that the Hungarian Government had produced a certificate from the Royal Minister of Justice issued in virtue of a statutory authorization to certify that "there is no law, or other written regulation in force in the country governing a given legal situation".[4] A certificate which is regarded as proof of certain matters under municipal law should doubtless always be accepted as such proof by the Court when applying the system of municipal law which provides for the certificate, and this particular example is doubtless merely an illustration of a general principle. The individual opinions of authors and politicians, particularly when in the nature of political declarations, the Court treats in this case as of no great weight.[5] It discusses the weight to be attached to entry in land registers as proof of legal personality and adopts as one of the criteria for the value which it will attach to such evidence the value of the registers in municipal law.[6] The Court also relies in support of its view upon the fact that the terms "University" and "University Fund" are used interchangeably in land registers, contracts, and deeds, and thus bases its view of municipal law on the practice shown by a series of instruments governed by that law.[7] The Court further indicates that it has satisfied itself as to the meaning of enactments by reference to the statements of reasons accompanying them[8] and that it will not attach importance to *obiter dicta* of doubtful relevance contained in municipal decisions.[9]

There is little evidence in the decisions as to the extent to which, and manner in which, the Court undertakes its own researches into questions of municipal law. When there is upon the bench a judge familiar with the municipal law under discussion there will be no great difficulty, but this is not necessarily always the position. In the *Danzig Legislative Decrees* case the Court decided that the fact that it was asked for an opinion on a question of Danzig law did not entitle Danzig to appoint an *ad hoc* judge,[1] and the same principle would apply in any other cases in which a state the municipal law of which is relevant in advisory proceedings is not a party to an existing dispute forming the subject of such proceedings or in which, in a contested case in which its law is relevant, such a state is not a party. The Court has never thought it necessary to refer a question of municipal law to experts. On one occasion a state the municipal law of which was relevant has been invited to appear in advisory proceedings as a state capable of furnishing information to the Court, but in this case, the *German Settlers in Poland* case, Germany appears to have been invited on the ground of her political interest in the case rather than as *amicus curiae*[2] to advise the Court on questions of German law.[3] There appears to be no provision authorizing the Court to invite a third state to appear as *amicus curiae* on the ground that its municipal law is relevant in proceedings between two other states.

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[1] *P.C.I.J.*, Series A/B, No. 62, p. 20.

[2] *Ibid.*, p. 23.

[3] *Ibid.*, p. 21.

[4] *P.C.I.J.*, Series A/B, No. 61, p. 230.

[5] *Ibid.*, p. 231.

[6] *Ibid.*, pp. 234–5.

[7] *Ibid.*, p. 234.

[8] *Ibid.*, p. 235.

[9] *Ibid.*, p. 235.

2. *The extent to which the Court is bound by municipal decisions on questions of municipal law*

The interpretation and application of municipal law by the Court is a comparatively simple process when the answer to the question raised is to be found in a code or in legislation in terms which admit of little discussion. More difficult problems arise in connexion with customary law and when it is necessary to consider a complicated body of case law relating to the effect of legislation, and first among these problems is that of the extent to which the Court will consider municipal decisions as binding upon it. The general principle which it has adopted is that it will regard municipal decisions as binding. The following extract from the *Serbian Loans* case is the classical passage upon the subject:

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[1] *P.C.I.J.*, Series A/B, No. 65, pp. 69–71. An attempt to meet the difficulty that an international court may be required to apply a system of municipal law with which none of its members is familiar has been made in the Convention for the Creation of an International Criminal Court signed at Geneva, Nov. 16, 1937 (League of Nations Doc. C. 547, M. 384, 1937, V). Article 21 of this Covention provides that "1. The substantive criminal law to be applied by the Court shall be that which is the least severe. In determining what that law is, the Court shall take into consideration the law of the territory on which the offence was committed and the law of the country which committed the accused to it for trial. 2. Any dispute as to what substantive criminal law is applicable shall be decided by the Court." To ensure that the Court has adequate knowledge of the law applicable Article 22 adds: "If the Court has to apply, in accordance with Article 21, the law of a state of which no sitting judge is a national, the Court may invite a jurist who is an acknowledged authority on such law to sit with it in a consultative capacity as a legal assessor."

[2] The term is here used as a convenient expression but in a non-technical sense.

[3] *P.C.I.J.*, Series B, No. 6, pp. 9–10, and Series C, No. 3, Vol. III, Tome 1, especially at pp. 592–693 and 719–48.

> "For the Court itself to undertake its own construction of municipal law, leaving on one side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national tribunal and which, in its results, seems to the Court reasonable, would not be in conformity with the task for which the Court has been established and would not be compatible with the principles governing the selection of its members. It would be a most delicate matter to do so, especially in cases concerning public policy—a conception the definition of which in any particular country is largely dependent on the opinion prevailing at any given time in such country itself—and in cases where no relevant provisions directly relate to the question at issue. It is French legislation, as applied in France, which really constitutes French law, and if that law does not prevent the fulfilment of the obligations in France in accordance with the stipulations made in the contract, the fact that the terms of legislative provisions are capable of a different construction is irrelevant."[1]

The importance attached by the Court to this principle is illustrated particularly forcibly by the manner in which the Court reasserted it in the *Brazilian Loans* case. In that case the special agreement provided that "in estimating the weight to be attached to any municipal law of either country which may be applicable to the dispute, the Permanent Court of International Justice shall not be bound by the decisions of the respective courts". The Court considered whether it should interpret the special agreement as meaning that, while not legally bound to follow the doctrine of the courts of the country the law of which it was applying, it remained free to do so if it considered that its task should be limited to applying municipal law in accordance with the construction placed thereon by national courts, or whether its duty under the agreement was to disregard the doctrine of the municipal courts and itself determine what was the most reasonable interpretation of the relevant legislation. It preferred the first interpretation as being the one "which is in principle compatible with a proper appreciation of its nature and functions", and declared that—

> "Once the Court has arrived at the conclusion that it is necessary to apply

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[1] *P.C.I.J.*, Series A, Nos. 20/21, p. 46.

the municipal law of a particular country, there seems to be no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.

It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case. If the Court were obliged to disregard the decisions of municipal courts, the result would be that it might in certain circumstances apply rules other than those actually applied; this would seem to be contrary to the whole theory on which the application of municipal law is based.

Of course the Court will endeavour to make a just appreciation of the jurisprudence of municipal courts. If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law. To compel the Court to disregard that jurisprudence would not be in conformity with its function when applying municipal law."[1]

The principle is therefore well established, and the point of interest is to determine its limits. The decisions in the *Serbian* and *Brazilian Loans* cases contain indications which are valuable for this purpose. Thus in the first case the danger which the Court declares itself concerned to avoid is that of "contradicting the construction which has been placed on such law by the highest national tribunal". Presumably it would feel greater freedom if the only decisions cited to it were those of inferior courts. In the same case the Court insists that the construction which it adopts is one "which, in its results, seems to the Court reasonable", thus suggesting that there may be a point at which it would be prepared to reject an established national construction as unreasonable. In the *Brazilian Loans* case the Court makes a similar qualification. It "will endeavour to make a just appreciation of the jurisprudence of municipal courts", and, "if this is uncertain or divided", will "select the interpretation which it considers most in conformity with the law". To dicta, it appears from the *Peter Pázmány University* case, the Court will not attach any great importance, particularly when they are of doubtful relevance.[2]

Two reservations to the general principle asserted in the *Loans* cases are suggested by other cases. The first is that the Court will apparently not regard as binding upon it municipal decisions interpreting a Constitution which is subject to the guarantee of the League of Nations. In the *Danzig Legislative Decrees* case the Court did not consider it necessary to follow, or even to discuss, the decisions of the Danzig courts. Judge Anzilotti, in his dissenting opinion, criticized the Court on this ground[1] and referred to the precedents of the *Loans* cases, but the reasoning of these cases would not seem to apply in cases where the instrument to be interpreted, even though not strictly speaking an international instrument, is of such a character that in relation to it the Court itself is really in the position of the "highest national tribunal" for the decisions of which it had professed respect in the *Serbian Loans* case. The second reservation is that if the Court has expressed an opinion on a question of municipal law for the purpose of determining whether there has been a violation of an international engagement it will not, in any subsequent proceedings relating to the reparation due for that violation, follow any intervening municipal decision in which the question of municipal law has been decided in a manner different from that in which it was decided by the Court. This was decided in the *Chorzów Factory* (*Merits*) case, in which the Court observed that by taking any other view "it would be attributing to a judgment of a municipal court power indirectly to invalidate a judgment of an international court, which is impossible".[2]

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[1] *P.C.I.J.*, Series A, Nos. 20/21, p. 124.

[2] *P.C.I.J.*, Series A/B, No. 61, pp. 235–6.

3. *The development by the Court of its own rules of Conflict of Laws*

Once it is admitted that the Court may have jurisdiction in cases which fall to be decided solely upon the basis of municipal law, the possibility clearly arises that the Court may have to determine conflicts of laws in cases in which there are no rules as to the conflict of laws which "possess the character of true international law governing the relations between states".[3] Any body of rules developed by it for this purpose will not be rules of international law in the sense of being uniform rules of the conflict of laws which states are under an international obligation to apply in municipal courts,[4] but they will be rules of international law in the sense of being rules for the choice of municipal law which will be applied by the Permanent Court (and doubtless out of deference for the Court by other international tribunals) whenever it is necessary for the Court (or such a tribunal) to determine what municipal law applies to certain facts. The only cases in which there has been any controversy before the Court as to the system of municipal law applicable to given facts are the *Serbian* and *Brazilian Loans* cases. Happily the judgments of the Court in these cases indicate in broad outline the manner in which the Court will build up its own body of rules for the choice of municipal law. The Court observes that, except in cases in which rules of conflict common to several states have acquired by convention or custom "the character of true international law governing the relations between states", the rules as to conflict are part of municipal law.[1] The Court must therefore (it is implied though not stated) develop its own rules. When required to determine the law governing contractual obligations it "can determine what this law is only by reference to the actual nature of these obligations and to the circumstances attendant upon their creation, though it may also take into account the expressed or presumed intention of the Parties".[2] The Court admits that "the law which may be held by the Court to be applicable to the obligations in the case, may in a particular territory be rendered inoperative by a municipal law of this territory—that is to say by legislation enacting a public policy the application of which is unavoidable even though the contract has been concluded under the auspices of some foreign law".[3] In any case in which it is disputed whether this is the position, the task of the Court will be particularly difficult, for in such a case the Court will be required to determine not merely what is the proper law of the contract but also whether the rules of another system of municipal law are of an imperative character and so preclude the application to transactions occurring in the territory where that law applies of the proper law of the contract. This may involve an evaluation by the Court of the requirements of the public policy of a particular country, a delicate task, for, as the Court itself has said, public policy is "a conception the definition of which in any particular country is largely dependent on the opinion prevailing at any given time in such country itself".[4] In the *Serbian* and *Brazilian Loans* cases this difficulty did not arise and they contain no indication of how the Court would have reacted to it. Indeed the only precise rule which the searcher for precedents can cull from them is that a sovereign state which has issued bearer bonds under authority granted by its own laws cannot be presumed, in the absence of either an expressed provision to that effect or circumstances which show irrefutably such an intention, to have intended to make the substance of its debt and the validity of the obligations accepted by it in respect thereof subject to any law other than its own.[1] For the formulation of further concrete applications of the principle that in determining what municipal law is applicable the Court will refer to the "actual nature" of obligations and the "circumstances attendant upon their creation" we must await future cases. Equally in the womb of the future is the Court's answer to the question how it will select municipal law for purposes other than that of determining which law governs contractual obligations.

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[1] *P.C.I.J.*, Series A/B, No. 65, pp. 63–4.

[2] *P.C.I.J.*, Series A, No. 13, p. 33.

[3] *Serbian Loans* case, *P.C.I.J.*, Series A, Nos. 20/21, p. 41.

[4] For illustrations of rules which have this status as between certain states see the Conventions adopted at the Hague Conferences on Private International Law (*British and Foreign State Papers*, Vols. XCV, XCIX and CXVI) and the Bustamante Code (Hudson, *International Legislation*, Vol. IV, pp. 2279–354, and the Conventions for the Settlement of Certain Conflicts of Laws in connexion with Bills of Exchange and Promissory Notes (Hudson, *International Legislation*, Vol. V, pp. 550–9) and in connexion with Cheques (*ibid.*, pp. 915–25).

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[1] *Serbian Loans* case, p. 41.

[2] *Ibid.*, p. 41.

[3] *Ibid.*, p. 41.

[4] *Ibid.*, p. 46.

4. *The interpretation of municipal law contracts by the Court*

Several of the decisions under discussion suggest the problem whether, when interpreting contracts governed by municipal law, the Court will consider itself constrained to attempt to apply the principles of interpretation of the municipal law governing the contract, or whether it will attempt to ascertain a "reasonable construction" without reference to any particular municipal principles of interpretation. In this connexion it has not adopted any rigid principle. It would appear from the *German Settlers in Poland* case that in the case of standard types of contract the effect of which is well settled in municipal law the Court will simply follow municipal law.[2] In other cases it appears to ascertain for itself what it regards as the intention of the parties. Thus in the *Serbian Loans* case the Court determines "the meaning which, on a reasonable construction, is to be attached to the terms of the bonds"[3] before considering by what law they are governed. In the course of the reasoning by which it arrives at such a "reasonable construction", the Court mentions the Serbian laws authorizing gold franc issues among the documents upon which it relies as proving the intention of the parties to contract in terms of gold francs,[4] and refers to French law as containing the accepted definition of the weight and fineness of the gold franc as "a well-known standard of value to which reference could appropriately be made in loan contracts".[1] It does not, however, interpret the bonds on the basis of either Serbian or French law, but frames its own reasonable construction and in the course of so doing expresses its view as to the extent to which the agreement has been executed should be deemed to be controlling in determining the intention of the parties.[2] In the *Brazilian Loans* case the Court again interpreted the bonds without any special reference to the law governing them, in this case Brazilian law, and indeed rejected a contention that "according to the legislative financial system of Brazil" a reference to obligations for gold payments simply signifies foreign loans in pounds sterling, French francs, or American dollars, on the ground that it had "not been referred to any adequate authorities in support of" this argument.[3] In the process of interpreting the documents relating to these bonds the Court formulated its own rule on the question of the weight which it will attach to statements in a prospectus for which a government has made itself responsible, and held that such a prospectus "may be regarded as a continuing offer to the terms of which each bondholder", whether or not he was an original subscriber, "is entitled to refer in case ambiguity is found in the statements in the bonds".[4] It also adopted the principle of *contra proferentem* as a rule for the construction of ambiguous instruments,[5] asserted that a "reference to a well-known standard of value cannot be considered as inserted merely for literary effect, or as a routine expression without significance",[6] and held that the standard of value denoted by a gold clause must be taken as of the time of the bond issues since it would be meaningless if it referred to an unknown standard of a future day.[7] In the *Lighthouses* case the Court reached its own conclusions as to the intention of the parties with reference to the scope of the concessionary contract,[8] and only after formulating these conclusions on the basis of general principles did it proceed to consider Ottoman law for the purpose of determining the validity of the contract. It indicated that it attached importance to the fact that the contract was one for the renewal of a previous concession and must therefore be presumed, failing proof to the contrary, to be of the same scope as that relating to the old concession. From an accumulation of such scattered pronouncements there may emerge in time a body of principles which will be applied by the Court for the purpose of determining the intention of parties to municipal law contracts. It will be interesting to observe how far these principles diverge from those applied by the Court in interpreting treaties.

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[1] *Ibid.*, pp. 42 and 121. In *The King* v. *International Trustee for Protection of Bondholders Aktiengesellschaft* [1937] A.C. 500, the House of Lords has taken a view of the circumstances in which a foreign state can be presumed to have intended to enter into a contract governed by foreign law which appears at first sight to differ from that of the Permanent Court. On closer consideration the difference proves to be little more than one of emphasis.

[2] *P.C.I.J.*, Series B, No. 6, p. 29.

[3] *P.C.I.J.*, Series A, Nos. 20/21, p. 40.

[4] *Ibid.*, pp. 30–1.

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[1] *P.C.I.J.*, Series A, Nos. 20/21, p. 33.

[2] *Ibid.*, p. 38.

[3] *Ibid.*, p. 116.

[4] *Ibid.*, p. 113.

[5] *Ibid.*, p. 114.

[6] *Ibid.*, p. 116.

[7] *Ibid.*, pp. 116–17.

[8] *P.C.I.J.*, Series A/B, No. 62, pp. 18–19.

For the purpose of determining the validity of a contract the Court has normally referred expressly to the municipal law governing it. In the *Mavrommatis* case, however, it discussed an argument relating to the validity of the concession contracts which was drawn "from those principles which seem to be generally accepted in regard to contracts, and from the probable intentions of the parties".[1] The point at issue was whether it was the intention of the parties that the grant of the concessions should be conditional upon M. Mavrommatis being of Ottoman nationality. It would seem probable that only where an allegation that a contract is invalid is in substance an allegation that there was no *consensus ad idem* can the Court properly determine such a question for itself without reference to the relevant system of municipal law. Where the point raised relates not to the intention of the parties but to their capacity or, unless the contract is alleged to be illegal as involving a violation of the law of nations,[2] to the legality of the contract, reference to municipal law would seem essential.

V. *The desirability of including in the Statute and Rules of Court provisions relating to the interpretation and application of municipal law*

In the light of the foregoing discussion it is now possible to consider how far it is desirable that there should be included in the Statute and Rules of Court provisions relating to the interpretation and application of municipal law. There are, it is submitted, three governing considerations which should determine the answer to this question. In the first place, it is desirable that there should be a franker and fuller recognition than there has been that in a variety of types of cases the functions of the Court necessarily include the interpretation and application of municipal law. If this is frankly recognized by some constitutional provision, the Court is likely to be less embarrassed in having recourse to municipal law than it has occasionally appeared to be, and therefore more likely to build up a consistent and well-thought-out body of doctrine upon the subject. In the second place, in view of the importance which the interpretation and application of municipal law seems likely to assume in the work of the Court, it is essential to ensure that its pronouncements on questions of municipal law are given under conditions which afford some real guarantee that they are authoritative pronouncements based upon adequate consideration of the relevant municipal material. The importance of this desideratum is not diminished by the fact that such pronouncements by the Court are unlikely to have any direct municipal effect in the near future. The prestige of the Court will suffer if it is in the habit of expressing opinions on questions of municipal law which do not command the unfeigned respect of municipal lawyers; it is clearly undesirable that questions of municipal law should be differently decided by an international court for the purpose of determining a preliminary question upon the answer to which a question of international responsibility turns, and by a municipal court which has jurisdiction to pass upon the same facts for the purpose of determining their effect at municipal law; and if any kind of municipal recognition is to be secured in the future for international decisions on questions of municipal law, it will be necessary to convince municipal lawyers that the procedure of the Court affords adequate guarantees that questions of municipal law are fully considered by the Court in their proper setting. In the third place, it is undesirable, at a relatively early period in the history of the Court, that the Court should be bound by provisions of the Statute, or should even itself adopt Rules, which limit its discretion unduly in the handling of relatively novel problems of this kind. Suggested changes in the Statute and Rules should therefore, with few reservations, have as their object to increase the discretionary powers at the disposal of the Court for the purpose of informing itself as to municipal law rather than to impose upon it any unduly rigid procedure.

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[1] *P.C.I.J.*, Series A, No. 5, p. 30.

[2] For a case in which it would be the duty of international tribunals to hold performance of a contract illegal in view of the provisions of the Covenant see "Report on the Application of Sanctions and Private Contracts of the Legal Sub-Committee for the Co-ordination of Measures under Article 16 of the Covenant in the Dispute between Ethiopia and Italy", *League of Nations Official Journal*, Special Supplement No. 150, pp. 6–7.

There are three possible additions to the Statute the desirability of which appears to deserve consideration. In the first place, there is at present no reference to particular systems of municipal law among the sources of law to be applied by the Court indicated in Article 38 of the Statute. The addition of a provision, including among the sources of law to be applied by the Court any particular system of municipal law which the Court may regard as governing transactions the effect of which it is necessary for it to appreciate, would have the advantage of giving constitutional authority for what is already the practice of the Court, would therefore conduce to a franker recognition of the importance of the Court's role in this sphere, and would be the necessary basis for any further changes in the Statute and Rules.

In the second place, some modification of Article 50 may be desirable. In its present form this article provides that "The Court may, at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion". The Court might clearly make use of this power for the purpose of obtaining an expert opinion on a question of municipal law. As the article is at present drafted, however, it may be difficult for the Court to utilize it for the purpose of approaching a municipal court for an advisory opinion given by some kind of case-stated procedure. There might be advantages in the existence of some recognized procedural arrangements under which it could seek such an opinion in cases in which it thought such a course appropriate, and the desirability of including in Article 50 of the Statute some provision for such a procedure therefore deserves consideration.[1] It would of course only be possible to apply the procedure in respect of states which had made the necessary municipal provision for enabling their courts to give opinions on questions of municipal law submitted to them by the Permanent Court; and clearly it would be unwise to apply the procedure as a matter of course. The function of such a procedure would be to enable municipal courts to assist the Permanent Court when the Permanent Court thought such assistance desirable, and only where very special circumstances existed would the Permanent Court be likely to refer a matter for the opinion of a municipal court in a case in which, in substance, the effect of such reference would be to transfer the responsibility for deciding a major point at issue to a court of one of the states in conflict.

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[1] The converse of such a procedure has been suggested by Lauterpacht, "Decisions of Municipal Courts as a Source of International Law", in this *Year Book*, Vol. X, 1929, pp. 94–5, for the purpose of enabling municipal courts to refer to the Permanent Court questions of international law.

The third possible modification of the Statute relates to the provisions for intervention by states not originally parties to the proceedings contained in Articles 62 and 63 of the Statute. There is no provision in the Statute whereby, in a contested case, a state has a right either to intervene or to apply to be permitted to intervene on the ground that questions relating to the interpretation of its municipal law will arise in the course of proceedings between other states. The fact that such questions may arise is hardly an interest of a legal nature in the sense of Article 62. As regards advisory opinions the position is different, for in the case of advisory proceedings the Court is entitled to hear "any Member of the League or State admitted to appear before the Court . . . considered by the Court . . . as likely to be able to furnish information upon the question".[1] It would appear appropriate to include in the Statute some provision under which in contested cases states, the municipal law of which is under discussion, are either entitled to intervene or may apply to the Court for permission to intervene. Neither a national court which disposes of a matter of an international character without hearing the representatives of an international organization the interests of which may be directly affected, nor an international court which deals with questions of municipal law without permitting some public officer of the state the law of which is under discussion to appear as *amicus curiae*, can be regarded as discharging its duties in an adequate manner.

The matters which it might be appropriate to deal with in Rules of Court are questions such as the special qualifications, if any, to be required of counsel who expound before the Court the effect of municipal law, the rules, if any, to be complied with for the purpose of ensuring that documents purporting to be statements of municipal law are of an authentic character, the authentication to be required for translations of such documents into the official languages of the Court, &c. All of these matters arise in a more general manner than in connexion with the application of municipal law by the Court, and it may be urged that no special rules relating to them are necessary when points of municipal law are in issue. The objection might be a valid one if the Court had rules of general application relating to these matters; but it has not, and in some of these cases, as for instance in connexion with the authenticity of municipal documents, some definite rule is more necessary to protect the Court from possible mistakes than in the field of international law in respect of which the Court is deemed to be familiar with the relative value of different sources of and collections of documents. In connexion with the qualifications of counsel, again, the right to appear before the Court is not restricted to any recognized international bar and, even if it were, the members of that bar would hardly as such be qualified to argue before it questions relating to all the various municipal legal systems. It would seem possible for the Court to prescribe some general rules upon these subjects without offending against the principle that it should not at the present stage of its history give its practice an unduly rigid character.

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[1] Article 66 of Revised Statute.

IMPUTABILITY IN INTERNATIONAL DELINQUENCIES

By J. G. STARKE, B.C.L.

§ 1

In the development of a particular branch of law, it is often found necessary to deduce certain concepts for the purpose of clarity and systematization. The more the concepts are employed, the more apparent becomes their practical advantage, although initially they serve but theoretical ends. Such a concept is that of *imputability.* Although not practically essential in the law as to international delinquencies, it does assist in clarifying the subject and in providing a proper framework for its theory. And in the practical application of this branch of international law it will be found to clear up difficulties which in its absence would be a source of confusion.

It is the object of this article to show that by applying the notion of imputability to the law on international delinquencies, the subject can be made at once more lucid and more scientific.[1] No claim of a critical nature is made that through the use of the notion different results or conclusions are reached from those at present generally accepted. The submission is rather that these results or conclusions become clearer and more intelligible through a knowledge of how the principle of imputability is applied. The present article does not therefore purport to give an exhaustive treatment of the relation between imputability and the law on international delinquencies, such a treatment being quite outside its scope. Nor does the article purport to criticize the existing terminology or the existing formulation of rules in the subject under discussion. The main point intended to be made is simply that a knowledge of the doctrine of imputability clarifies both the rules and the terminology, and leads to greater exactness in their application.

The international lawyer, when considering international delinquencies, tends to think principally of the consequences of the act, namely, state responsibility. A simple example will suffice. An official of state X has caused certain injury to an official of state Y, as the result of conduct which is found to violate the provisions of a treaty between the two states. The consequence is the following—and here we adopt the current language of international lawyers—state X will be responsible to state Y for the injury done. In practice it is this aspect of the matter that calls for attention; and in particular for consultation of precedents to determine whether states have been held responsible in circumstances similar to those under review. But there is a juridical situation to be considered which precedes this. It is said that state X has acted in breach of the provisions of the treaty entered into with state Y.

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[1] For short treatments of imputability, see Anzilotti, *Corso di Diritto Internazionale*, pp. 230 *et seq.*, pp. 416 *et seq.*; Kelsen, "Unrecht und Unrechtsfolge im Völkerrecht", *Zeitschrift für Öffentliches Recht*, 1932, p. 481, at pp. 496–503.

What does this statement mean? Remembering always, as Kelsen has taught us,[1] that the "state" denotes an abstract juristic entity coextensive with the law governing a specified collectivity of individuals, we interpret it as follows: an organ or official of a collectivity of individuals represented by the entity X has acted in breach of international law, and the conduct in breach is *imputed* not to the organ or official but to the entity. The imputation is thus the result of the intellectual operation necessary to bridge the gap between the delinquency of the organ or official and the attribution of breach and liability to the state. Imputability is the quality with which international law endows states for the purpose of conferring on these entities rights and duties which are in reality the rights and duties of their organs or officials.

The notion of imputability is thus relatively straightforward, and it might be asked why importance should be attached to it in the subject of state responsibility now under consideration. Why, for instance, in ordinary civil law, with regard to the liability of corporations for the tortious acts of officials, has the theory of imputability not received the same emphasis as is accorded to it in international law? One answer to these queries can be given immediately. The subject of state responsibility is one that touches closely the relation between international law and the municipal law of the state, and, where the particular competence of the organ or official under municipal law is in issue, may involve a certain amount of complication, which can only be made clear through a precise conception of the nature of imputability. It is always to be remembered that the imputation of liability results from rules of international law operating in an autonomous manner, and depends only in an indirect and secondary degree on municipal law.

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[1] See *Der soziologische und der juristische Staatsbegriff*, Tübingen, 1922.

Let us take the following example to illustrate the point. The municipal law of state X may lay down specific conditions, e.g. as to the scope of an official's employment, under which the state is not to be responsible for wrongs committed by the official. International law may, however, in the case where another state, Y, or its citizen, sustains damage through the official's act, impute to state X the delinquency committed by the official, provided it is in breach of international law, even though, according to municipal law, it was not imputable by reason of specific rules as to the scope of employment. Consequently imputability for the purpose of state responsibility depends directly on rules of international law operating of their own force. The point is important because, as regards the redress to be obtained, there is a material difference between municipal law and international law, and imputability supplies the touchstone whereby the limits within which liability arises in one system can be distinguished from the limits within which it arises in the other. A precise notion of imputability at international law is, therefore, essential, not merely scientifically but practically, in order to separate process in municipal law from that at international law.

To sum up, imputability depends on the satisfaction of two conditions: (*a*) conduct[1] of an organ or official in breach of an obligation defined in a norm of international law; (*b*) the attribution to the state, in conformity with international law, of the said breach of international obligations. It is important to emphasize these two factors. For the purposes of state responsibility, only breaches of international law can be imputed to the state, and in the imputation itself the norms of international law operate autonomously. With this in mind, it becomes apparent how imputability can help to make clear the distinction between formal and substantive law, a very important distinction for the subject of state responsibility. The term responsibility is bound to be confusing unless care is taken to determine precisely what breach of international obligation is to be imputed to the state against which claim is made. The process always involves two stages, the determination of the breach of obligation, and the decision whether or not such breach is imputable to the state; if the breach is imputable the state becomes internationally responsible for the delinquency. Responsibility only begins where imputability ends.

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[1] The conduct may, in addition to positive action, consist of omission or neglect to perform a duty of international law.

The confusion between responsibility and imputability, that is to say, between redress and breach of a substantive obligation, is nowhere more apparent than among writers dealing with the principles as to exhaustion of local remedies. The essential matter here is really in what circumstances may individual claims by the nationals of one state against another state be, so to speak, taken under the wing of the former state and made the subject of process in the international forum. Let us examine this more carefully. On analysis it will prove to illustrate clearly not merely the expediency of the notion of imputability but the relation between municipal law and international law, which is so pertinent to the making of the imputation. In order to see the matter concretely we will take as a practical example the facts which were the subject of the Finnish Ships Arbitration.[1] Vessels belonging to Finnish shipowners had been taken over during the War by the British Government without compensation being accorded to the owners, and the latter had unsuccessfully proceeded in the English courts for hire and the value of three vessels lost by enemy action. The Finnish Government then brings the matter before the League of Nations Council, and objection is taken that the government is not entitled to take up the case because the shipowners have not exhausted their local remedies under English law.

It is necessary at the outset to distinguish two sets of facts. The first set is involved in the original conduct of the British Government in requisitioning the ships without paying compensation to the owners. The second set consists in the absence of a remedy given by English courts or by English law. Looking at the matter now on principle, it is evident that the claimant government has two possibilities with regard to the original conduct of the British Government: (1) It may claim that this conduct was a breach of English municipal law as to which the municipal courts should have afforded a remedy, or that it was such that redress should have been provided therefor by municipal law, or (2) it may claim that the conduct not only fell within class (1), but was in addition a breach of international law. Each of these possibilities must be studied.

In case (1), the shipowners will in their civil proceedings put forward the claim that the conduct is imputable to the state (i.e. Great Britain). But the claim of their government rests on another consideration, on imputability at international law, viz. on the linking to the state concerned of a breach of international obligation. For this purpose the only possible circumstance imputable to the state internationally, since no allegation is made that the initial conduct was a breach of international law, is the failure of the state's municipal law, or of its courts, to give such normal redress as the citizens of one state would under the circumstances be entitled to expect from the law or courts of another state. The civil claim of the shipowners and the international claim of the plaintiff state are, therefore, in direct relationship. The failure of civil remedies is the condition precedent and the basis of the international claim. The rule as to the exhaustion of local remedies is consequently in this case purely a rule of substantive law.

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[1] See article in the *British Year Book of International Law*, 1936, by A. P. Fachiri, pp. 19 *et seq.*

Case (2) differs a little from case (1). (i) If redress has been obtained by the shipowners in the civil courts, and the claimant state invokes the responsibility of the other state at international law, the rule of exhaustion of local remedies no longer applies as a rule of substantive law; it is purely a *procedural* rule since the only possible imputable conduct is the alleged *original* breach of international law, and the claimant state is merely obliged to wait until the civil remedies have been obtained in the ordinary way before postulating its case internationally. (ii) If redress has not been obtained, the nature of the rule of exhaustion of local remedies appears even more complicated. In addition to the possibility of imputing the initial breach of international obligations to the state, international law may further impute the failure of the municipal law or courts to give redress. As regards the initial breach of international obligations, the rule of exhaustion of local remedies still appears as in (i) to be a procedural rule, since, in relation to this alleged breach, the claimant state was merely obliged to wait for the results of suit as to the alleged breach of municipal law in the civil courts. As regards the failure of the municipal law or courts to give redress, this now becomes an alleged breach of international obligations, so that the rule as to the exhaustion of local remedies here assumes the character of substantive law. In sum, the rule appears as a combination of substantive and of procedural law, viewed from each aspect of the situation which forms the basis of claim.

It will be seen that the notion of imputability supplies guidance through a complex of matters involved in the very fact that there are different obligations under municipal law and under international law. By using the notion, the principles of the law as to exhaustion of local remedies become more clear and precise, and any confusion between substantive and procedural law is avoided. The value of imputability is not exhausted, therefore, by its importance in the purely theoretical field.

§ 2

We will now discuss in more detail the exact nature of imputability.

In general, the obligations imposed by international law are, in the rules formulated for that purpose, expressed as binding states, not organs or officials of states. Consider Article 2, first paragraph, of the Aerial Navigation Convention, 1919. This provision reads:

> "Each contracting state undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting states, provided that the conditions laid down in the present Convention are observed."

The text of the provision is not, however, self-explanatory. What it really means is that each state undertakes[1] that *its competent organs or officials* will accord freedom of innocent passage to the aircraft of other states, although these organs or officials are not specified in the article and are to be ascertained only by reference to the internal constitutional arrangements of each particular state. The obligations imposed on a state are obligations falling on prescribed organs or officials of the state, and the question which organs or which officials are competent to perform the obligations must in general be decided by consultation of municipal law. In his *Corso di Diritto Internazionale*,[2] Anzilotti has well expressed this:

> "The statement that international duties are the duties of states as such amounts to this, that it is an exclusively internal matter for the state to determine which individuals are bound to act in accordance with these duties."

The matter is less straightforward, however, when there are questions involved as to *breaches* of international obligations. From the point of view of imputability it is first of all necessary to ascertain whether the organ or official concerned in the delinquency stood in such a relationship to the state, as determined by municipal law,[1] as would entitle it or him to perform the obligations imposed on the state. For this purpose, evidence will be offered as to the particular functions under municipal law of the organ or official concerned. Once this relationship—that is the *general competence* of the organ or official—is positively determined, international law proceeds in a completely autonomous manner. It may or may not impute to the state the conduct of the official which is in breach of international obligations. For instance, it may be that the official, though generally competent in the matter, has acted without consulting his superiors or in disobedience to his superiors; municipal law may therefore probably not impute his act to the state for purposes of civil responsibility. On the other hand, it may turn out, as in the *Youmans* case,[2] that international law will in the same circumstances impute to the state the conduct of its officers so as to make the state internationally responsible for all injurious consequences.

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[1] The undertaking may also be interpreted as one to introduce legislation to the same effect. This consideration does not affect the argument used above.

[2] At p. 418.

This possible divergence between the norms of municipal law and of international law is fundamental to an appreciation of the subject of state responsibility. Although the divergence is fundamental it is not irreconcilable. The divergence, such as it is, is based simply on the different considerations which lie at the root of municipal law and of international law, and on the different interests which play a role in each case. It therefore goes no farther than the limits of each system of law. The *ultra vires* conduct of the organ or official of the state will not affect the imputation autonomously made by international law, nor does imputability at international law have the slightest effect on the civil responsibility which the state may incur on account of the action of its organ or official.

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[1] As the principal object of this article is to demonstrate the serviceability of the nature of imputability, and its value in solving questions possibly involving complications through the relation between international and municipal law, attention has been paid above almost entirely to general competences of state agencies based on municipal law. Indeed, so far as the actual cases go, all the practical instances in which alleged state responsibility has been invoked have involved only general competences based on municipal law. It is, however, possible to conceive cases where certain general competences of particular state agencies are defined very closely in bilateral treaties, or (more rarely) in multilateral conventions, and not by municipal law. These cases are very special, and do not affect the main principle which the article emphasizes—the autonomy of international law in making the imputation.

[2] In this case, a lieutenant of state forces in a town in Mexico was ordered by the mayor of the town to proceed with troops to quell riots against and stop attacks being made on certain citizens of the United States of America. The troops, on arriving at the scene of the riot, instead of dispersing the mob, opened fire on the house in which the Americans were taking refuge and killed one of them. The other two American subjects were then forced to leave the house, and as they did so were killed by the troops and the mob. It was *held* by the General Claims Commission that the Mexican Government was responsible for the wrongful acts of the soldiers even when acting in disobedience of rules laid down by superior authority, when it is clear that at the time of the commission of these acts the soldiers were on duty and under the immediate supervision and in the presence of a commanding superior. (See *Annual Digest of Public International Law Cases*, McNair-Lauterpacht, 1925–6, p. 223.)

Above, we have considered the case of a state agency generally competent in the matter under consideration. There is a further possibility to be examined. It may be that in the breach of international obligation there was involved an organ or official having no general competence in the matter at all. This differs somewhat from the case we have discussed, inasmuch as there the state agency, though under the circumstances generally competent, acted *ultra vires* only in the detailed performance of certain duties of its office.

Now on principle an *ultra vires* act committed by an incompetent state agency is not such an act as can be imputed to the state. The imputation depends on a relationship which is here proved not to exist, since the agency cannot be said to have acted on behalf of the state. Nor is this inconsistent with the fact that states have on several occasions been held responsible on facts resembling those stated. In no way are such cases irreconcilable with the view maintained that responsibility depends on an imputable breach of international obligations. For it will be found on closer examination of the precedents that what was involved, i.e. what was imputed to the state, was not the delinquent act committed by the incompetent agency, but the breach by other state agencies of some other obligation of international law, whether an obligation to restrain the commission of the act or to punish the offender, or to take such measures as to prevent the recurrence of the offence.

Support for this statement of principle will be found in the report of the sub-committee of the Committee of Experts for the Progressive Codification of International Law (1927), a report among others which prepared the way for The Hague Conference of 1930 on the Codification of International Law. There it was said:[1]

> "*If the act of the official is accomplished outside the scope of his competence*, that is to say, if he has exceeded his powers, we are then confronted with an act which, juridically speaking, is not an act of the state. It may be illegal, but, from the point of view of international law, the offence cannot be imputed to the state.

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[1] See *Report of the Committee to the Council of the League of Nations on the "Questions which appear ripe for international regulation"*. League of Nations Doc. C. 196, M. 70, 1927, V, p. 97.

> "Those who seek to render states responsible for such acts are obliged to fall back on theories which are often ingenious but which have no place in international law. We may quote, for instance, the theory of *culpa in eligendo* or in *custodiendo*. This theory, like all the other faulty theories, is based on a *praesumptio juris et de jure*, which cannot be applied in international law."

and in the conclusions of the report the Rapporteur laid down the following rule:[1]

> "The state is not responsible for damage suffered by a foreigner, as a result of acts contrary to international law, if such damage is caused by an official acting outside his competence as defined by the national laws, except in the following cases:
>
> "(*a*) If the government, having been informed that an official is preparing to commit an illegal act against a foreigner, does not take timely steps to prevent such act;
>
> "(*b*) If, when the act has been committed, the government does not with all due speed take such disciplinary measures and inflict such penalties on the said official as the laws of the country provide;
>
> "(*c*) If there are no means of legal recourse available to the foreigner against the offending official, or if the municipal courts fail to proceed with the action brought by the injured foreigner under the national laws."

If there are reasons for not imputing to states the acts of incompetent agencies, the grounds for not imputing the acts of mere private individuals would appear to be very much stronger. The doctrine of imputability, so far as it has been formulated, rests on the assumption that the delinquency has been committed by an agency *at least* of the state concerned. Professor Brierly has well expressed this:[2]

> "It is well-established law that a state does not guarantee the person or property of a foreigner on its territory. It is liable only for its own delinquencies, which means, since the state itself is an abstraction, for such injurious acts or omissions of 'authorities' of the state, as international law, on principles of which the main outlines at least are well settled, attributes to the state itself."

It is only necessary to deal with the point here inasmuch as some writers speak of the responsibility of states for the tortious acts of private individuals, a confusion of terminology which should be avoided. The matter would be clearer if for the word "for" were substituted the words "with respect to". What happens is that international law imputes to the state not the acts of the private individuals, but the breach by state agencies of international obligations in regard to the damage or injury which is the consequence of those acts. What these obligations are is to be determined with regard to the circumstances in which the injurious acts were committed, but in any event responsibility can only be based on the breach of these obligations. The so-called responsibility of states for the acts of private individuals would therefore appear to fall under the general heading of imputability of acts of state agencies.

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[1] See *Report of the Committee to the Council of the League of Nations on the "Questions which appear ripe for international regulation"*. League of Nations Doc. C. 196, M. 70, 1927, V, p. 104.

[2] Brierly, "Theory of Implied State Complicity in International Claims", *British Year Book of International Law*, 1928, p. 42.

Nor do these principles rest merely on theoretical considerations. They are founded as much on the constant practice of international tribunals and on the views of governments expressed in diplomatic correspondence arising from claims in such cases. We need only look at a particular example of damage done by private individuals, namely, that inflicted on the property or persons of aliens in the course of riots. This special damage was the subject of a claim by the United States in the *Home Missionary Society* case, before the British-American Claims Arbitral Tribunal.[1] The claim was dismissed. The Court affirmed that:

> "It is a well established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection";

and went on to point out that there was no evidence to support the contention that the British Government, against whom the claim was laid, had failed in its duty to afford adequate protection for life and property. Apart from actual cases, the sub-committee of the Committee of Experts for the Progressive Codification of International Law (1927) which reported on the question of state responsibility, dealt with the matter on the same lines. In the conclusions of the report,[2] the following rule was laid down with reference to damage sustained in the course of riot, revolution, or civil law.

> "Damage suffered by foreigners in case of riot, revolution or civil war does not involve international responsibility for the states. In case of riot, however, the state would be responsible if the riot was directed against foreigners, as such, and the state failed to perform its duties of surveillance and repression."

In other words, what would be imputable to the state would be the failure of its competent organs or officials to perform the duties of surveillance and restraint of dangerous individuals. State responsibility must therefore be linked to the breach of specific international obligations by the agencies of the state concerned.[1]

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[1] See *Annual Digest of Public International Law Cases,* Williams-Lauterpacht, 1919–22, pp. 173–4.

[2] See *Report of the Committee to the Council of the League of Nations on the "Questions which appear ripe for international regulation"*, League of Nations Doc. C. 196, M. 70, 1927, V, pp. 104–5.

It is often said that a state is not responsible to another state for injurious acts committed by its agencies, unless they are committed wilfully and maliciously or with culpable negligence. In so far as this statement implies the necessary existence of a mental condition undetermined by, or unconnected with, objective rules of international law, it will be found difficult to accept so general a conclusion and so invariable a requirement. The theory of imputability—a theory based empirically on actual rules of international law and their practical application—is inconsistent with any general condition of the presence of malice or culpable negligence. How does the process of applying the imputation work? The obligation falling on the state's competent authorities is defined in a rule of international law or in an international convention; the actual conduct, subject of the claim, is compared with this obligation, and if a breach of the obligation is positively determined, this conduct will be imputed to the state provided the state agency concerned has the requisite competence and its action took place in such circumstances that international law will make the imputation. If the original rule or provision of the convention does not envisage malice or culpable negligence, it is difficult to see how this can be invoked as a condition of the imputation and of responsibility.

It is probable that "culpable negligence" means in this connexion no more than the breach of an international obligation to perform or abstain from a certain line of conduct. Whether a mental element is added or not would appear to depend simply on the specific rule of international law which is claimed to be applicable to the case under examination. But to add a general floating requirement of malice or culpable negligence seems to contradict the scientific and practical considerations which underlie the law of international delinquencies.

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[1] The *measure* of that responsibility is, of course, a quite different matter from the imputation of liability. In the *Janes* case, the Court, in estimating the reparation to be payable in circumstances arising out of the murder of an American citizen, took into account the "indignity" done to the relatives of the victim through the non-punishment of the criminal by the authorities of the state of Mexico. In his article on the case (*British Year Book of International Law*, 1928, pp. 42 *et seq.*), Professor Brierly shows clearly that the decision does not affect the principle that it is the complainant state which alone is wronged by the breach of obligation of the authorities of the defendant state; but in his view added damages may be given in respect of "indignity" to the nationals of the complainant state, since by the non-punishment of the criminal the defendant state may be taken to have "condoned" the original crime. This consideration has, of course, no bearing on the way in which the imputation of liability is first of all made.

Some practical examples may be given in support of our view. For instance, on referring to Article 2 of the Aerial Navigation Convention, 1919, cited above, no mention is made of malice or culpable negligence; the undertaking on the part of each state is absolute in form "to accord freedom of innocent passage". And this is the common practice with undertakings laid down in international conventions. Can it be argued that the failure "to accord freedom of innocent passage" must be conditioned by the presence of malice or culpable negligence for the purpose of state liability? The breach of obligation is established quite independently of this requirement, quite independently indeed of any such mental condition on the part of the state agency whose conduct is the basis of imputation.

Nor do the actual decisions of international tribunals justify a general condition of malice or culpable negligence. An instructive precedent is supplied by the case of the *Jessie*,[1] which came before the British-American Claims Arbitral Tribunal in 1921. There the United States of America was held responsible to Great Britain for the action of its officers although such action was "bona fide" and in the belief that it was justified by a joint regulation adopted by the two countries. The tribunal laid down the wide principle that:

> "Any government is responsible to other governments for errors in judgment of its officials purporting to act within the scope of their duties and vested with power to enforce their demands."

Obviously, therefore, the absence of malice or culpable negligence was not necessary for the imputation to the United States of the conduct in breach. Additional authority in support of our view may be found in the fact that the general rule as to state responsibility framed by the sub-committee of the Committee of Experts for the Progressive Codification of International Law (1927) is not explicitly or implicitly based on the presence of malice or culpable negligence. The text of the rule is as follows:

> "A state is responsible for damage incurred by a foreigner attributable to an act contrary to international law or to the omission of an act which the state was bound under international law to perform and inflicted by an official within the limits of his competence, subject always to the following conditions:
>
> "(*a*) If the right which has been infringed and which is recognized as belong-

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[1] See *Report of the Committee to the Council of the League of Nations on the "Questions which appear ripe for international regulation"*, League of Nations Doc. C. 96, M. 70, 1927, V, p. 104.

ing to the state of which the injured foreigner is a national is a positive right established by a treaty between the two states or by the customary law;

"(*b*) If the injury suffered does not arise from an act performed by the official for the defence of the rights of the state, except in the case of the existence of contrary treaty stipulations."

As can be seen, the form in which the rule is expressed is absolute. The general conclusion would appear to be that malice or culpable negligence is neither a general condition of imputability nor in all cases an element essential to constitute the delinquency. The question depends simply on the requirements stated in the particular rule of international law which is applicable to the case under examination.

There remains to be considered the problem of imputability in regard to vassal states or states members of a federation. Action in breach of international law has been committed by agencies of such states, and it is sought to invoke the responsibility of a state at international law. Against whom will the claim of the injured state lie? In the sphere of international relations, states members of federations and vassal states have no status which enables them to act internationally. Only the entities represented by the federal state and the protector state can claim to stand internationally for the collectivities of individuals in the member states of the federation and in the protected state. Indeed, the juristic creation of the position of these entities was designed to obviate responsibility at international law being incurred by subordinate entities.[1]

Assume there is a rule of international law creating obligations for the federal or the protector state. To determine which authorities are to see to the fulfilment of these obligations, we must refer to legal orders other than international law. In effect, a double reference is required, first to federal law or to the law governing the relations between the protector and vassal state, and then to the law of the subordinate state. The agencies of the states members of the federation or of the vassal state, are, *qua* performance of international obligations, really agencies of those entities, federal state or protector state, which alone have an autonomous international position.

This reasoning may seem artificial, but it is necessarily involved in the use of such artificial legal concepts as those of a federal or a protector state. Apart from theory it has, too, a solid foundation in the actual practice of international law. It is not our purpose to discuss here the cases in which such responsibility has arisen,[1] but it may be said that so far as claimant states are concerned, the position has always been taken that agencies of subordinate states are in effect, *qua* fulfilment of international obligations, the agencies of the federal or protector states. Indeed, it is probably true that federal or protector states would resent the invocation of any principle other than that stated, on the ground that to enforce claims against the subordinate state would be to interfere without warrant in a purely internal field. Even municipal law provides some support for the theory we take above. For it is a common practice of legislation under Federal Constitutions to invest provincial agencies with federal jurisdiction or federal functions; such agencies are therefore in so far true federal agencies. On principle, and applying the analogy, it would follow that provincial agencies performing obligations belonging to the sphere of international affairs—a sphere reserved to the federal state—are to this extent federal agencies.

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[1] See as to the whole subject Eagleton, *The Responsibility of States in International Law*, Chapter II.

It is consequently not difficult to follow how the principle of imputation works on a breach of international obligations by the agencies of subordinate states. Once the general competence of the agencies is determined, it remains to apply the rules of international law for the purpose of ascertaining whether the breach is, or is not, imputable to the federal or protector state. Few better illustrations could be offered of the independence of the imputation made by international law. By municipal law, process of civil responsibility can only lie against the state member of the federation or against the protected state. At international law, the delinquency is imputed to the federation or to the protector state.

The matter has been very well expressed in the report of the sub-committee of the Committee of Experts for the Progressive Codification of International Law:

> "In composite states, the infraction of an international rule by one of the component states of the federation involves the responsibility of the central power, which represents the state in its international relations. The central power may not advance the argument that the component state is autonomous; it cannot, any more than a centralized state, plead the independence and autonomy of authorities of a member state in order to avoid responsibility for, say, some legislative act. *An argument of this kind, which might be admissible in domestic law, is inadmissible in international law*, because, as regards relations between states, the community of nations only recognizes the authorities which represent a state in external affairs.

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[1] As to federal states, see Donot's *De la responsabilité de l'État fédéral à raison des actes des États particuliers.*

THE GROWTH OF STATE CONTROL OVER THE INDIVIDUAL, AND ITS EFFECT UPON THE RULES OF INTERNATIONAL STATE RESPONSIBILITY

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INTERNATIONAL society is in process of a transformation, which international law can no longer afford to ignore. Admittedly, international law could never achieve stability, even fragmentary, if it were to react upon every change in the constitutional, economic, or social life of one or several of the members of the family of nations, but every law is the expression of a particular society, and nothing would endanger international law more than to consider as absolute rules which have been built on a social basis that is undergoing deep alterations. The perpetual struggle between the need for stability and the need for a realistic and modern law is more obvious in the still embryonic international than in the more settled national society.

The League of Nations, however greatly it affected international law and society in some respects, was, in another way, merely the crowning effort of a society of states as it stood in 1914, a society of sovereign nations which based their rules of international conduct upon the ideas of enlightened democracy, liberal in its political and capitalistic in its economic outlook. Since 1919 the struggle for or against the League has perhaps unduly overshadowed the profound change which has affected this social and political basis of international law. The tacit basis of agreement on fundamental social values, on which alone legal rules can work, has been more and more shattered by the defection of a number of nations from the standards loosely summarized under the lofty phrase of "Christian Civilization" and, in practice, amounting to certain common conceptions of life, liberty, property, and the nature of international society. This question, which certainly goes to the very roots of international law, cannot be pursued any further here[1] although the problems to be studied in this article have some bearing upon it.

The object of this article is to analyse the legal significance of another evolution, largely independent of the one just described. It results from social and political forces working with different intensity, but essentially in the same direction, within almost all the member states of the family of nations. This is the gradual intrusion of the state into spheres which constituted formerly a reserve of the individual.

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[1] For a preliminary survey cf. my articles in *Contemporary Review*, July 1937, pp. 62 *et seq.*, and in *The Fortnightly*, 1937, pp. 432 *et seq.*

It is submitted that all the customary rules touching international state responsibility are, in fact, based upon a particular division of the spheres of state and individual. These rules presuppose that the state has traditionally certain functions, broadly speaking the conduct of foreign policy, the control of the armed forces, and certain functions of executive government. The state was a guardian standing by for the protection of its citizens. Apart from the duties corresponding to these state functions, the citizens were free to do and move as they liked. In particular, trade and industry was their concern and responsibility. Mercantilism did not influence these international principles, partly because its reign was too brief and not sufficiently universal, but mainly because the principles of international state responsibility were developed during the nineteenth century, the century of *laisser-faire*.

The increase of state control operates upon these rules with different effect, according to the nature of the matter:

1. It extends the privilege of state immunity in foreign countries to spheres not contemplated when international practice on this question crystallized. This practice granted the state almost complete immunity before foreign courts, on the tacit assumption that international commerce was, as a matter of course, in the hands of individuals subject to civil liability. When states began to own merchant fleets, to operate railways, to buy goods abroad, when, further, state banks, state subsidized commercial undertakings, public corporations, &c., appeared in international transactions, this assumption became questionable. Since this development started far back in the nineteenth century, this problem has, by now, received some attention in court practice and theory. The necessity of adjusting legal principles to new social conditions gradually leads to a qualification of state immunity, as a corollary to state activity in spheres formerly occupied by the individual.

2. On the other hand, the increase of state control operates in the opposite direction where customary international law has assessed the international responsibility of the state as a political entity on the assumption that state control is limited to the activities briefly described above. Here, the responsibility of states

which have extended their control to spheres not contemplated by the customary rules, tends to be automatically increased. It appears to be mainly in the law of neutrality and of state responsibility for international delinquencies that this effect takes place. The limits of state responsibilities in both these branches of international law have also mainly developed during the nineteenth century (those of neutrality mainly under the influence of American neutrality policy). Despite the change in the economic and social conditions which alone make these rules intelligible, they are quoted without question by recent editions of standard works on these matters.[1] So long as the state everywhere left trade and industry to its subjects, and limited its control over their lives to certain strictly defined duties, the customary rules could operate satisfactorily. Nor would a different constitution of one or perhaps some of the members of the family of nations suffice to shatter these rules. Customary international law has always been based upon the standards prevalent, even if not universally practised, among the members of the family of nations. But when several of the biggest states, controlling the lives of many hundreds of millions, resort to different methods of government, and when many other states follow suit, as far as the control of internationally relevant actions of their citizens are concerned, it is no longer possible to consider the old standards as self-evident. Every international lawyer has before him a picture of international society and bases his arguments, tacitly or expressly, thereon. The present article is based on the assumption, supported by the experience of a continuous development of the last twenty years, that the increase of state control is an international phenomenon of more than transitory character.[2] Many legal arguments of recent years have been expressly based upon a different assumption.[3] The choice between these assumptions is not a matter of legal argument. But economic statistics and municipal legislation provide enough material for the lawyer to make his choice something more than mere belief or personal conviction.[1]

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[1] Cf. Oppenheim, 5th ed. by Lauterpacht, Vol. II, sec. 332, 349–52; Spaight, *Air Power and War Rights*, 2nd ed. 1933, pp. 455–6.

[2] One aspect of the growth of state control in its international legal significance will not be considered in detail in this article, viz. its effect upon the distinction between combatants and non-combatants, and thereby, on the laws of warfare. On this problem all that the lawyer can contribute has probably been said, notably in discussions on the limits of aerial bombardment. (See, in particular, Spaight, *Air Power and War Rights*, 2nd ed., pp. 212 *et seq.*) That the distinction is becoming increasingly difficult, is obvious, and equally obvious is it that in recent wars there is little attempt to observe the distinction. On some of the relations between the extension of totalitarian warfare and the extension of state control, see below, p. 138.

[3] See, e.g., Lauterpacht, "Boycott of foreign goods", *B.Y.B.*, 1933, pp. 127–8; Fitzmaurice, "State Immunity", *ibid.*, p. 119.

A short and necessarily sketchy survey of some of the most important examples of, and methods of, increase in state control may usefully precede the discussion of the legal problems. It can be confined to developments of international relevance. Purely internal measures, like nationalization of the land, can be left out of account for the purposes of this article.

State control over economic life has assumed many different forms, the principal of which appear to be the following:[2]

(*a*) *Control of production*

1. Direct state ownership and control of means of production. (All industry in Russia, arms manufacture in France, state steel works in Germany, state railways in most states, &c.)
2. State supervision over private production. (German Vierjahresplan 1936, Japanese five years plan, 1937. Italian state control over production and banking.)
3. Public Corporations under state supervision. (British Broadcasting Corporation.)
4. Mixed Undertakings. (State participation in industrial enterprise (especially developed in Germany).)
5. State subsidies given to private undertakings coupled with state participation in management. (Imperial Airways; shipping lines in many countries.)
6. Private companies concessioned by state licence. (Broadcasting companies in France.)

(*b*) *Control of exports*

1. State licence for exports. (e.g. export of war materials in Germany and Great Britain.)
2. State supervision over trade with belligerents. (American Neutrality Act.)
3. State trade monopoly. (Over all trade in Russia; trade monopolies over important national products in many states, e.g. Germany, Sweden, Turkey, Latvia.)

Which of these many forms is chosen is partly a matter of expediency, partly a question of incorporating state control over certain matters in a predominantly private capitalistic economic system. It is therefore not always easy to ascertain for international purposes whether and how far the state does actually exercise control. Similar difficulties arise, however, in the application of many general legal principles to the facts of a particular case. The test must always be to what extent the state actually controls the policy of the particular trade or industry in question. Mere subsidizing, for example, will hardly be sufficient, but ownership of the majority of shares will normally indicate control.

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[1] See Lawley, *Collective Economy*, 2 vols., 1938, where the whole development is illustrated by a wealth of material.

[2] For an exhaustive survey see Lawley, *ibid.*

It is, of course, impossible, in this article, to give even the briefest survey of the extent to which production and trade has come under state control in the states. But a few examples may illustrate the importance of the process.

1. *Export of war materials*[1]

U.S.S.R.: State production and trade monopoly.

U.S.A.: Embargo on export of war materials to belligerents under Neutrality Act, 1937. Government control over export of war materials in American state vessels, in times of peace or war.

GREAT BRITAIN: Export of war materials only with government licence.

FRANCE: Arms industry in course of being nationalized.

GERMANY: Export of war materials only by licence of *Reichskommissar* for exports and imports (Law of Nov. 6, 1935).

ITALY: State control over arms industry.

JAPAN: Government control under five years plan, 1937.

2. *Control over export of raw materials*

U.S.S.R.: Complete state trade monopoly.

GERMANY: Office for German raw and industrial materials under the four years plan. Its task is the supervision of the production of all German industrial raw materials. The *Reichskommissar* for export and import and the *Reichskommissar für Preisbildung* supervise foreign trade and prices for all industrial and agricultural production.

Reich monopoly for oils and fats (April 1933).[2] State owned steel and iron works.

ITALY: Government control over production of coal, oil, and petroleum, and supervision over all industrial production.

GREAT BRITAIN: State control over production of oil and petroleum.

JAPAN: Government five years plan of June 15, 1937, to adjust the supply and demand of commodities and to expand productive capacity.

All this is, of course, peace-time legislation (although largely in pursuance of a policy of permanent war preparation). For the extension of state control in time of war reference may be made to the developments in the Great War.

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[1] For a general survey of state control over production and export of raw materials see Lawley, *l.c.*, Vol. II, pp. 172 *et seq.*

[2] Cf. Extract from Report of Department of Overseas Trade on Economic Conditions in Germany (to March 1936):

> "Dr. Schacht's New Plan brought to a very high pitch the degree of government control over all foreign trade and the Government could direct the purchase and sale to whatever countries of commodities which were of most service at the time to the national interests. . . ."

Railways.

In Europe 67 per cent. of all railways are state owned. With the exception ~~of Great Britain~~, every state has at least partial ownership of railways.

Finance and Banking.

Germany: Credit and banking undertakings subject to government licence. (Law of Dec. 5, 1934.)

Italy: State control over the whole banking and finance system. (Decree of March 23, 1936.)

There are also many big state banks, notably in Germany, Poland, Sweden, Australia. International currency movements are now universally state controlled. In many countries this is done through strict currency legislation. In other countries international gold movements are under state control (e.g. the Tripartite Agreement between Great Britain, France, and the United States of America). Big international credit operations are thus largely subject to state control. Currency control legislation also serves as a further means of state control over foreign trade. Licence must be obtained for imports, and proceeds from exports must be handed to the state with a detailed indication of their source.

I. *State immunity before foreign courts*

The question how far states should be exempt from foreign jurisdiction when they engage in activities which produce civil and financial liabilities abroad, is not entirely one of international law, at least not in its present stage. There is at most a general customary rule, based on general state practice, that, in principle, a state can demand immunity.[1] The exact scope of immunity is, however, determined by municipal law, subject, of course, to international conventions (like the Brussels Convention, 1926). The ascertainment of the extent of state immunity involves, however, an examination of the international position of the state, and its treatment throws some light upon our problem. Some excellent comparative studies[2] make it possible to summarize briefly the present position.

The original doctrine was that a state was immune from foreign jurisdiction, subject only to two almost universally recognized exceptions: (1) Actions against the state in respect of real property situate in the foreign state. (2) Cases involving submission to the foreign jurisdiction. Difficulties arose when the state began to engage in commercial adventures, to act *iure gestionis.* Cases affecting the state as ship or railway owner, as banker or as party to commercial contracts with foreign persons raised the problem whether it should still enjoy, in this capacity, privileges granted to it in its sovereign majesty as a member of the family of nations. The answers given by the courts of the various countries differ widely.

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[1] For an original inquiry into this question, see Provinciali, *L'immunità giurisdizionale degli Stati stranieri*, 1933.

[2] Notably Allen, *Position of foreign States before National Courts*, 1933; Fitzmaurice, *B.Y.B.*, 1933, pp. 101–24; Gidel, *Revue de droit international et de législation comparée*, 1932, pp. 34–70; Van Praag, *ibid.*, 1934, pp. 652–82; Niboyet, *Revue générale de droit international public*, Vol. XLIII, p. 525 (1936); Stoupnitzky, *Revue de droit international et de législation comparée*, 1936, pp. 801–33.

Clear and unambiguous is the answer given by the courts of Great Britain, the United States, and some other countries. The state, in whatever capacity it appears, remains exempt from foreign jurisdiction. English courts, in successive decisions,[1] have considered themselves bound by precedent, although recently not unaware of the difficulties to which this position may lead.[2] Courts in the United States have also refused to qualify the rule, but sometimes with an entirely different reasoning. In the *Pesaro*[3] the Supreme Court declared:

> "We know of no international usage which regards the maintenance and advancement of economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force."

Similarly, it was said, in a judgment of the Supreme Court of South Africa:[4]

> "In my opinion, any use of a vessel for the purpose of obtaining revenue for the state is a public purpose just as its use for the protection of the state is public. By means of revenue obtained from trading the state is assisted in providing for its army and navy."

In such reasoning, curiously enough, the recognition of wider state functions is not used to demonstrate the inapplicability of the old rules but, on the contrary, to reinforce them.

German courts have also hitherto refused to restrict the scope of immunity.[5] But the new problems have been discussed in decisions and legal literature, and Germany is one of the powers which has ratified the Brussels Convention. Also a partial change of court practice may occur through a wider construction of implied submission of the foreign state to the German jurisdiction,[1] thereby producing results not far removed from those obtained by Italian courts. English courts, however, have refused such a construction.[2] Scrutton L.J., in the *Porto Alexandre*, thought that the consequence of the strict practice would be to discourage commercial relations with foreign states. Powerful developments, however, such as increasing state interference in economics, will hardly be stopped by rigid legal rules; the only positive result of such practice (which English and American courts, owing to the strict doctrine of precedent, have more difficulties in changing than continental courts) might be the hastening of municipal legislation or of international treaties.

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[1] *Parlement Belge* (1880), 5 P.D. 197; *Porto Alexandre* [1920] P. 30; *Duff Development Co.* v. *Kelantan Government,* [1924] A.C. 797.

[2] See Scrutton, L. J., in the *Porto Alexandre,* p. 36.

[3] 271 US. 562–74.

[4] *De Howorth* v. *S.S. India,* South Africa Law Reports (1921), C.P.D. III, 451.

[5] Cf. the *Ice King* case, R.G. 103,274.

The courts of a number of continental countries, at first those of Belgium and Italy, later those of Switzerland, Egypt (Mixed Tribunals), Roumania, and more recently those of France, Austria, and Greece, have departed from the old unqualified rule and attempted, in various ways, to distinguish the old and the new sphere of state activity. In view of the existing studies on this subject (see above, p. 123, n. 2, and notably Allen's monograph) it will suffice here to examine the various criteria suggested with a view to finding some guidance for the general legal problem of state responsibility.

It appears that there have been three different lines of approach in the attempt to find a practicable solution:[3]

1. The form of the transaction decides. In particular, a state, when concluding a contract, descends from the sphere of sovereignty into that of private relations, thereby abandoning its privileged position. This attitude looms large in Belgian and Italian decisions. Thus a purchase of shoes for the army by military authorities was held to be a private act, because sale of goods is regulated by Civil Law.[4] Similarly a contract for the supply of bullets.[5] Securing the same supplies by requisition in war, confiscation, &c., would be an act of sovereignty.[6] A recent example is *Rappresentanza*

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[1] See Fitzmaurice, *B.Y.B.*, 1933, p. 104.

[2] The decision in *Fenton Textile Ass.* v. *Krassin* (1922), 38 T.L.R. 259, refers to the personal diplomatic immunity of a Russian trade agent. Its reasoning implies, however, a recognition of principles rejected in regard to state immunity by English courts.

[3] The following analysis is partly in accordance with that of Fitzmaurice, *l.c.*, pp. 109–24. The conclusions are different, mainly owing to the assumption of Fitzmaurice that state control is a transient phenomenon that has "passed its peak".

[4] *Governo Romeno* v. *Trutta*, Corte di Cassazione, *Giurisprud. Italiana*, 1926, Vol. I, p. 774.

[5] *Soc. pour la Fabrication des Cartouches* v. *Ministre de la Guerre de Bulgarie*, Civil Trib. Brussels, 1888, *Pasicrisie*, 1889, Vol. III, p. 62.

[6] Allen, *l.c.*, p. 263.

Commerciale dell' U.S.S.R. c. *De Castro, Foro 1935*, I, 1387, a case decided after the conclusion of a commercial treaty between the U.S.S.R. and Italy. This was held not to be applicable to a contract made by the Russian Trade Agency in Istanbul, which accordingly was held liable.

2. The status of parties in the particular transaction decides. Only acts done by the foreign state in its sovereign function give immunity, or, as it is often put, those done for a public purpose, but not others. This appears to be the test adopted by some earlier Italian decisions.[1] It has found a champion in Lapradelle.[2] Such a test seems to correspond to the distinction made in the municipal law of many countries (e.g. Germany and France) between the state as sovereign and the state as fiscus. But the difficulty of this test as an internationally valid criterion lies in the wide discrepancy of the conceptions in various countries about the functions of the state. Contracting for military supplies, for example, is an act of a private nature in the eyes of Italian and Belgian courts (*Fisola's* case) but an exercise of sovereign functions in the eyes of the American Supreme Court. The same contrasting opinions exist with regard to commercial shipping which, to the Supreme Court of South Africa (*De Howorth's* case, above p. 124), is "a means to provide state revenue, a clear example of activity for a public purpose".

3. The nature of the transaction decides. Commercial transactions of the state are not protected by immunity. This distinction has gained recognition in the Brussels Convention of 1926, ratified by nine countries, among them Germany and Italy, and in force between them. The convention provides that sea-going vessels owned or operated by states, as also the states themselves in respect of claims relating to the operation of such vessels or to the carriage of their cargoes, are subject to the same rules and liabilities as private vessels, cargoes, and equipments. It does not apply to craft used exclusively on government and non-commercial service. The convention, of course, only deals with commercial shipping, not with other commercial state activities. The same test has been adopted by the French courts since they abandoned their older practice of unqualified immunity.[3] Niboyet,[4] in a

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[1] Notably by the Corte di Cassazione in *Fisola's* case (contract erection of fortifications); for an excellent account see Allen, *l.c.*, pp. 234–9.

[2] *Revue de droit international privé*, 1910, p. 787, and *Sirey*, 1912, 4. 2.

[3] Cour d'Appel de Paris, 19.ii.26, Chambre des Requêtes, 19.ii.29, Cour de Paris, 28.vii.32. *Revue de droit international privé*, 1932, p. 671.

[4] *Revue générale de droit international public*, Vol. XLIII, pp. 525 *et seq.*, 1936.

learned discussion of recent judicial developments in France, approves this line of approach. He points out that the other suggested tests made it necessary to cut state activity into two, one sovereign and one not, which was practically and theoretically impossible. It was the international position of the U.S.S.R. which compelled the French courts to look the problem in the face and to adopt, in the words of Niboyet, "a heroic solution". Hitherto state intrusion into economic matters had presented itself as a casual and isolated phenomenon. Now, for the first time, a state considered economic activity, internally and internationally, as as integral part of the state's sovereign function.

Although none of these tests is free from difficulties (though the same may be said of innumerable general definitions when applied to individual cases), I submit that the choice between them is not difficult, if the general purpose of state immunity and its bearing upon international relations is kept in mind. I also submit that it would be very unsatisfactory to adopt a fourth solution as suggested by Fitzmaurice, *l.c.*, viz. to abide by the old rule. Had the state's economic activity really passed its peak, it would be otherwise. But that is not so in 1938, whatever may have been the case in 1933.

The first of the above-mentioned tests would be unobjectionable, if civil and sovereign forms of legal relations were quite distinct. But the distinction may be as difficult as in *Di Capone's* case,[1] where a Greek subject had sued the Greek state upon a promise given in 1825 to restore to the exiled Greeks land which it was stated in the promise belonged to them. The court held that this was only a unilateral offer (in the nature of a proclamation), whereas Cavaglieri, in a note to that case[2] thinks that it was a proper contractual obligation subject to the condition of its being restored to Greece and that it should therefore have been within the competence of the Italian courts.[3] Nor does the distinction help in cases of tortious acts. Thus, in *Governo Francese* c. *Ceretti e Consoci* c. *Serra*,[4] an action was brought against (*inter alia*) the French Government for injuries suffered as a consequence of an explosion due to a bomb negligently left lying about on a vessel towed by French naval authorities. The Italian courts denied immunity to the French Government, deducing their jurisdiction, illogically, from the contract entered into by the French Government in regard to the towing; the liability for the explosion could only be based upon tort. Now a tort produces liability in public as well as in private law. It is a general category. The formal criterion will therefore be ultimately resolved into one of substance, viz. did the state act in its sovereign or in its private capacity? (test 2.)

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[1] *Stato di Grecia* v. *Di Capone*, Appeal Court, Naples, *Rivista di Diritto Internazionale*, 1927, p. 102.

[2] *Riv. di Dir. Int.*, 1927, p. 111.

[3] Art. 105 C.P.C.

[4] *Riv. di Dir. Int.*, 1925, p. 540.

3. The fallacy of trying to distinguish between state acts of a public and those of a non-public nature lies in the attempt to take as static and permanent a state of affairs and a conception of state functions which are transitory. International society in the nineteenth century was sufficiently agreed upon the function of the state to make a general distinction. International society in 1938 is not. Within the states, such distinctions may be established and altered, from time to time, through legislation or judicial practice, in accordance with social changes. International standards have to reflect a kind of average conception prevalent among the members of the family of nations. And to stipulate internationally that the state acts for public purposes only outside the sphere of economics, is an unreal assertion in a world in which every state, socialist, fascist, or democratic, has assumed an increasing amount of control over economic activities.[1] Could it be seriously contended that the British Government, when raising a loan in the United States of America in 1917, was not acting for a public purpose? Yet there is no doubt that it bound itself by private contract and the contract was even held to be governed by American law, contrary to the usual implication in cases of government contracts.[2] Even in that bulwark of the economic and social order upon which many of the present rules of international law are based, the United States of America, the Supreme Court has declared that the pursuit of economic welfare is a paramount public purpose (above, p. 124). At a time when one great state has assumed complete control of economic activities and many others operate in that field directly or indirectly, no sphere of life is potentially incapable of becoming a public instead of a private function. On the other hand, in a society of sovereign states, it would be impracticable to detract from the immunity traditionally enjoyed by states for those activities always internationally associated with it. But such immunity is and should be in the

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[1] See also Niboyet, Fitzmaurice, *l.c.*; Van Praag, *Revue de droit international et de législation comparée*, 1935, p. 126.

[2] H.L., *Rex v. Int. Trustees for the protection of Bondholders* (1937), Law Times Rep., Vol. CLVI, p. 352.

nature of a special privilege, derogating from a general principle of law under which rights and duties should correspond to each other. To extend such privilege is not in the interest of law or of international relations, unless, indeed, one considers that it is not the task of law courts to develop the law. In that case, courts should make it quite clear that the law needs reform, but that this is possible only through legislation or international treaties.

The solution adopted by the Brussels Convention for commercial shipping and by the French courts for all commercial state activities therefore appears to be the only practicable solution. It does not attempt to fix once and for all which state activities are sovereign or for public purposes and which are not. It simply assimilates the position of states, in so far as they engage in commercial transactions, to those of other persons. It extends the equality of position in that respect to the enforcement of judgments and the attachment of property (thereby meeting the difficulty stressed by Fitzmaurice, *l.c.*, p. 122). It is to be regretted that so far only nine states, neither Great Britain nor France nor the United States being among them, have ratified the Convention.

The problem arises, in this form, only where states engage in international commerce, side by side with private trade. In the relations between the U.S.S.R. and other states the problem arose how to combine the position of the Russian Trade agencies abroad, considered by Russia beyond any doubt as representatives of the sovereign state, working for a public purpose, with the need of making the Russian state liable for commercial transactions entered into in its name. It is to be welcomed that, after some years of uncertainty, the position began to be clarified by a number of bilateral treaties between Russia and other states, which seem to have given satisfactory results. The principle of these treaties[1] has been for the U.S.S.R. to assume full responsibility for all obligations incurred by the official trade representative in the country of the other contracting party, but to decline responsibility for any other obligations incurred in its name, unless they were sanctioned by a guarantee of the trade representative.

Apart from Russia, the present state of affairs seems characteristic of a period of transition, during which the principle of private enterprise is theoretically upheld, but gradually undermined in practice, while the theoretical position is not yet clarified.

Another fact adds to the confusion. Very often the state activity is not direct and open, but disguised. The state may act through a company, private in form, but in fact entirely or predominantly state controlled; it may subsidize other public entities, such as borough or county councils, thereby enabling them to borrow abroad; it may join with private enterprise in a mixed undertaking. The practice of those countries which mechanically grant immunity to the foreign state as a party, no matter in what capacity, on the other hand, strictly limits the immunity to the state as such, acting directly. In those cases it pays the state to assume direct responsibility for international transactions of a commercial nature. It is true that in these cases there will mostly be an express or implied submission to the jurisdiction. The House of Lords has recently cut down still more any privileged position of the state engaged in international transactions of a commercial or financial character by stating that English law does not recognize a rule to the effect that where a sovereign state is party to a contract, its own law invariably applies. This fact was only of importance in drawing the appropriate inference as to the intention of the parties regarding the choice of law.[1] Nevertheless, the difficulty is avoided in a more satisfactory way by those jurisdictions which refuse immunity where the state has become a party to civil transactions or which refuse to extend it to commercial transactions. With regard to these countries, the foreign state has no incentive to snatch responsibility from other public undertakings. Once the rule of the Brussels Convention were extended to other commercial state activities, it would probably clarify the theoretical as well as the practical position if states carried on their commercial activities through special juristic persons.

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[1] For details see Stoupnitzky, *Revue de droit international et de législation comparée*, 1936, pp. 801–33.

II. *Neutrality*

With the eclipse of the League Covenant which, if it did not abolish, at least largely diminished the significance of neutrality, neutrality has again gained in importance, especially in a world in which war is unhappily once more the ultimate *arbiter rerum.* Recent discussions on the law of neutrality have indeed taken into account some changes produced by modern totalitarian warfare, but seem to have ignored the fact that the widespread and far-reaching changes in the relations of state and individual are bound to affect greatly the rules of neutrality.[2] The rules dealing with the duties of neutral states are, in fact, based on the assumption that the individual citizen of the neutral country is free not only to trade but generally to move as he likes, without involving the responsibility of the state. In a world in which trade was a private occupation as a matter of course, and in which the predominant picture of the functions of the state was still that classically described by Humboldt (*Ueber die Grenzen der Wirksamkeit des Staates*) it was possible to formulate a number of rules which are bound to operate differently in a society of states with a different social structure.

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[1] *Rex* v. *Internat. Trustees for the Protection of Bondholders* [1937] A.C. 500.

[2] See, for example, the four volumes on *Neutrality*, edited by Jessup and Deak, 1936.

1. A neutral power is not bound to prevent the export or transit for one or the other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to the army or to the fleet. (Art. 7, Hague Conv. V, Art. 7, Hague Conv. XIII.)

The very form of this rule shows that the possibility of the manufacture or trade in arms being a state concern was not contemplated. Nor do the reports on the proceedings of the Second Hague Conference suggest that there was any discussion of this possibility. The form of the relevant articles resulted from a French and a Belgian proposal. The French proposal said:

> "Un État neutre n'est pas tenu d'empêcher *ses sujets* d'exporter des armes..."

The Belgian proposal had the form of the final article. The French addition "ses sujets" was merely dropped, apparently as being superfluous. There was no discussion at all on this article,[1] which shows that the problem to be discussed here was not at all in the minds of the delegates. It would be somewhat farcical to speak of "prevention" of exports of arms, &c., if the state itself controlled the manufacture of or trade in war materials. A similar position arises with regard to the neutrality rules on neutral volunteers, loans to belligerents, neutral transports for belligerents, which will be discussed below.

A process frequent in the history of law occurs. The old rule is maintained—at least in theory—although the basis on which it was devised has disappeared. The basis has disappeared because, in a growing number of states, and largely irrespective of their political complexion, the freedom of the individual is curtailed, either by direct substitution or by supervision of the state. This process appears to be farthest advanced in regard to arms exports. Whereas, however, the old rule above quoted is one of universal customary law, the change in the respective spheres of state and individual is one which does not yet apply universally, and, moreover, is of varying intensity within the different members of the family of nations. Some illustrations of this have been given (above, pp. 121–3).

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[1] Scott, *The Hague Peace Conference*, Vol. I, p. 630; Lémonon, *La Seconde Conférence de la Haye*, p. 415.

What appears certain, however, is that the customary rules of neutrality, as laid down in The Hague Conventions, prove inadequate to meet the situation.

1. They assume that trade is universally private.
2. They presuppose an equilibrium which existed only so long as all the states lived under substantially the same forms of social and economic organization.

The position can be well illustrated by the present Sino-Japanese war. What, in that war, are the legal rights and duties of five potential suppliers: Great Britain, the United States, France, Germany, and Russia:[1]

(*a*) with regard to arms and war materials;

(*b*) with regard to other supplies?

1. British citizens require a licence for the export of war materials, which will not be given without due regard to political considerations. It is unlikely, for example, that in the present war, a licence would be granted for export of arms to Japan. Other goods and material can be freely exported from Britain to either belligerent.

2. American citizens are subject to the provisions of the Neutrality Act of May 1, 1937, provided it is put into application. (This had not been done up to February 1938.) Its application presupposes a proclamation of the President that there is a state of war, and it appears that in this respect he can exercise a fair amount of discretion. Once he has declared that there is a state of war, a compulsory embargo on the export of all war materials comes into force (sec. 1). Furthermore, the President may, at his discretion, specify further articles which may be supplied, but not in American bottoms and not before property has been trans-

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[1] It is assumed that there is a state of war, despite the absence of a declaration of war. It may also be noted that a Member of the League of Nations, when forbidden by neutrality rules to allow certain supplies to belligerents, might justify such supplies to the attacked side by Article 16. This article does not presuppose a resolution, but is in the nature of an authorization for Members to apply sanctions when they consider the conditions have arisen. Thus, the League Covenant, even when no longer applied collectively, will still afford good legal defence to individual Members. However, in conflicts between Members and other states, the latter will not recognize the Covenant as good law, and the issue will be ultimately one of force.

ferred to the buyer. In regard to Japan and China, the Neutrality Act has not yet been applied, but the President has applied another form of state control, by prohibiting the shipment of war materials to either belligerent in American state ships (which appears to have practically stopped all arms traffic with Japan or China) (sec. 2, sec. 6). Finally, all exports of war materials anywhere require a licence of the National Munitions Control Board which will issue them unless to do so would be in violation of American law or treaties signed by the United States of America (sec. 5 (*f*)).

3. In France trade in general is private, but the manufacture of arms has been substantially nationalized. The control of production must be taken to include the control of export. Moreover, a new law of January 1938 puts all sale of arms under licence. The legal problem raised by nationalization of arms manufacture will be discussed below.

4. The export of war material from Germany is subject to licence of the Reichskommissar (Law of November 6, 1935). That such licence will be given in accordance with political considerations is shown by the Spanish Civil War. Other goods, in so far as not subject to the wide control under the Vierjahresplan (e.g. war materials) are theoretically free, but subject to the currency regulations. Finally, there is the general political control of a fascist state over the activities of its citizens, which would make it, for example, practically impossible for a German openly to supply goods to the Spanish Government in the present war, although there is no law to forbid it.

5. Russia. Here the problem created by the inapplicability of the customary rules to different social conditions comes out most clearly. In Russia the production and export of war materials as well as of any other article are nationalized. Now the rules laid down in The Hague Convention permit of two opposite interpretations. It may be argued that since a state need not prevent the export of arms, it does not matter whether the state itself has stepped into the shoes of private business and assumed control. Had the form of the French proposal been adopted (see above, p. 131), this interpretation would be difficult. On the other hand, it may be contended that the assumption of such control automatically increases the neutrality duties of the state and it must therefore abstain from any supply to either side. This position would be the same as obtained under the American Neutrality Act (which is, of course, merely municipal law). Both arguments seem, at first sight, compatible with the customary

law, but a formal interpretation does not even touch the fringe of the problem. To decide that a state which assumes control over the foreign trade in such goods as affect neutral obligations is in the same position as its private predecessor would have the advantage of leaving the customary rules intact, avoiding the necessity of inquiring into the exact internal conditions of a state in order to ascertain its international duties, and of preventing inequality in the obligations imposed upon the different members of the family of nations. Nevertheless, such a solution would be impracticable and dangerous. Even if it were possible to divide the state into an *État souverain* and an *État commerçant*[1] with respect to its international responsibilities, this is impossible in regard to its attitude towards belligerents. In recent international conflicts no major power has been neutral in its sympathies or disinterested politically in the outcome of the conflict. Accordingly the commercial adventure of supplying goods to a belligerent becomes a strongly political act, if done under the auspices of the state. Profit may still be a motive, but it is inextricably mixed with and mostly overshadowed by the political aspect. It appears in that light not only to international public opinion, which certainly does not regard in these days supplies of Italian arms to the Spanish insurgents or of Russian or German arms to China as purely commercial acts. It cannot help having that aspect for another reason; where trade and industry are in the hands of thousands of individuals some measure of balance in the supplies to both sides is usually obtained by the operation of the profit motive and the varying commercial connexions (subject, of course, to special military or geographical factors, which may practically limit supplies to one side, as in the Boer War or in the Great War). But states will not often supply both sides with equal zeal. No German or Italian arms have gone to the Spanish Government, no Russian arms to the Spanish insurgents or to Japan, no British export licence, so far as is known, has been issued for arms to Japan in the present war.

On the other hand, the alternative of augmenting the state's international responsibility, as it assumes control over matters formerly private, presents equally grave difficulties. Were the progress from private trade to state control parallel in all states, it would be feasible to extend international responsibility accordingly. But that is not the case. In only one major state is state control open, universal, and absolute, in others it is partial and disguised, and, in some, not sufficiently developed to be capable of legal definition. Again, the present system of international law is based upon the principle that membership of the family of nations should be independent of the internal structure of a state. The challenge to that principle which, at one time, came from Russian Communist writers, and now comes mainly from German National Socialist jurists,[1] is a clear sign of threatening disintegration of the present structure of international law, which stands and falls with that principle. But if, in any war between other powers, a state like Russia were to be debarred from supplying any goods of military value to belligerents (in particular, in view of the continuing extension of the notion of contraband, see below, p. 138) it would, in effect, amount to penalization because of a particular form of social organization. The tender fabric of international law will hardly stand such a strain. Either rights and duties of states must be equal in principle, or the international community will break up. With regard to the related question of the sanctity of private property as a principle of international law, Sir J. Fischer Williams has convincingly shown that it cannot be regarded as such.[2] A contention that private enterprise is an axiom of international "civilized" society, and that states which deviate from it must pay the price, would only prove that international society had broken up beyond hope, and that customary law was, at most, valid between such states as still adhered to the old principles of social organization.

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[1] Stoupnitzky, *l.c.*, 1936, p. 801.

Now the control of the arms trade is perhaps the one field in which the change from private to state control can be said to be sufficiently definite and general not only to have destroyed the old law but also to make possible an outline of the new law. In international law the evolution from one customary rule to another is often prepared by treaties and conventions, concluded at first for special occasions and purposes. In this respect, a number of recent internationally important events are of great significance. When sanctions against Italy were agreed on in 1935 by the League, fifty-two states found no difficulty in enforcing the decision that trade relations with Italy in arms and certain other goods should be stopped. In the Non-Intervention Agreement concerning the Spanish Civil war—made, it may be remembered, without there being an internationally recognized state of war—states agreed to ban the export of war materials to either side in Spain, and

[1] Cf. e.g. Bockhoff, *Völkerrecht gegen Bolschewismus*, 1937.

[2] *British Year Book of International Law*, 1928, p. 21.

enacted legislation accordingly. Not one of the contracting parties appears to have objected that it was unable to interfere with the trade of its citizens, nor has it ever been suggested that any lack of effectiveness of that agreement was due to such inability. The fact that almost universal agreement was secured on these two occasions between states which were not themselves in a state of supreme emergency such as war, and which involved the acceptance of an obligation to prohibit the supply of war materials to certain foreign states, gives evidence of a significant change. The American Neutrality Act, enacted in a country which was more instrumental than any other in developing the pre-war conceptions of neutral rights and duties, points in the same direction. When Germany and Austria-Hungary complained to the United States during the Great War about the fact that supplies of arms were practically confined to the Allied states, the reply was that there was no neutral obligation either to prevent citizens from carrying on trade in arms with belligerents at their discretion, or to ensure that both sides were supplied equally. Professor Garner was able to prove by an overwhelming weight of state practice and text-book authority (including an opinion by Gentilis given when England complained about the supply of foreign arms to Spain during the Anglo-Spanish war),[1] that neutral obligations had never extended so far.[2] Until the Great War, there were only very few cases of neutral states having voluntarily prohibited the sale of arms to belligerents, a measure which, needless to say, was always permitted, although not ordered by international law. Some smaller states did so in the Franco-Prussian war of 1870, and quite a number of them in the World War (under strong British pressure). To-day a similar assertion could not be made with confidence. Until the Great War the manufacture and export of arms were universally private. Now, all the major and many minor states control either both or one of them.

It is submitted that a general consensus of state practice has already destroyed the customary rule of law that a neutral state need not prevent the export of war materials to belligerents. International custom results from similar and repeated acts by states, supported by the *opinio iuris sive necessitatis*, the feeling that such practice corresponds to legal obligations.[3] At least one of these elements no longer exists in support of the old rule. True, the rules fixing the duties of neutral states are sanctioned by the conventions of the Second Peace Conference at The Hague.[1] But, firstly, these conventions were only ratified by a part of the contracting states, so that, owing to the general participation clauses in both these conventions, they are not formally binding. Secondly, the assertion that these conventions were declaratory of customary international law and therefore binding as such, notwithstanding this formal objection,[2] falls once it is shown that the customary law has changed.

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[1] Cf. Nys, *Le droit international*, Vol. III, p. 637.

[2] *American Journal*, 1916, pp. 751 *et seq.*

[3] Cf. Oppenheim, Vol. I, par. 17; Kopelmanas, *British Year Book of International Law*, 1937, p. 139.

Finally, it is submitted that, even if the conventions were formally binding, the *clausula rebus sic stantibus* could for once be applied, not as an excuse for law-breaking, but in a way analogous to the English doctrine of frustration and to the advantage of international law. The underlying basis of the Conventions was (*a*) that the export trade in arms was universally in private hands, (*b*) that the obligation should apply to the contracting parties with equal force.

The same principle applies, of course, to the rule regarding neutral volunteers (see below, p. 141) which, in speaking of "individual persons crossing the frontier" assumes that they do so on their own behalf and responsibility, not by command or direct encouragement of their government.

It is far more difficult to say what law, at the present stage, has replaced the old one. The new practice, which is developing through international treaties as above mentioned, has probably not yet hardened into a legal rule. All one can say is that a new customary rule is in the process of formation and that it will be on the lines of recent agreements such as the Non-Intervention Agreement. It must be emphasized that, in all these recent international treaties or municipal enactments the control of the state over certain international movements and trade is assumed independently of differences in internal constitution or economic principles. Control of exports of arms does not presuppose nationalization of the arms industry, although the latter includes such control. Agreement was obtained by an adjustment of internal conditions for the purposes of the particular international agreement. This adjustment was clearly and almost as a matter of course in the direction of more state control. The non-totalitarian states undertook to control activities of their citizens which customary international law allowed them to leave uncontrolled. The new neutrality is moving towards complete abstention.

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[1] V, Art. 7; XIII, Art. 7.

[2] Cf. Garner, *International Law and World War*, Vol. I, § 17.

Such a development of the rules touching arms exports would, however, be far from bringing solution to the many and grave problems produced by the modern totalitarian trend in all its aspects. Cutting off the supply of arms and war materials to belligerents would have serious but, in a time of growing industrialization of states, not necessarily vital consequences, so long as the supply of other goods and especially of commercially important raw materials were to continue. But parallel to the increase of state control has gone a development towards totalitarian warfare, which admits less and less difference between war materials proper and other articles that, in some way or other, might strengthen the power of resistance of the opponent. It is not necessary here to recount developments so familiar to international lawyers as the extension of the notion of contraband, notably in the Great War, when hardly any article, except possibly ostrich feathers,[1] remained exempt. Since then the totalitarian character of warfare has further increased and has contributed, in its turn, to the extension of state control over matters formerly outside the sphere of war. Modern war has become a struggle between highly organized states, directed not only towards military victory, but towards the demoralization of the enemy by starving him out, by beating his industrial and agricultural output, by organizing every citizen, man, woman, or child, in the struggle. Such a type of war demands strong centralization and organization, even in times of peace. It increases the trend towards permanent state control, which is fostered by other factors as well. They all lead away from the liberal conceptions of a free play of forces. The two tendencies mutually reinforce each other. On the one hand, in no major war in these days will a powerful belligerent allow any neutral goods of importance, whether oil, food, or clothes, to reach his opponent, if he can help it. The totalitarian character of warfare, in its turn, increases the endeavour of neutral states to keep out of the war, even by sacrificing trade. To achieve this end, and to avoid incidents which might jeopardize this endeavour, the neutral state is compelled to assume more and more control, even in time of peace, over its foreign trade.[2] The result of a continued policy of international sanctions would, in this respect, be the same, but for a very different motive and purpose. Either policy will increase the trend towards increased state responsibility, whether the impulse comes from the internal side (state intrusion into economics) and affects indirectly the international responsibility, or whether it comes from the international side (totalitarian warfare) and affects indirectly internal developments. The American Neutrality Act of 1937 is a tentative move in this direction. Here the impulse towards increased state control—in a country still strongly addicted to the free play of economic forces—comes from the international side—the desire to avoid the risk which continued freedom of neutral trade with belligerents may bring. But the Act hardly attempts to solve more than the limited problem of the export of arms. The provision that the President may specify goods which may only be shipped after the property has been transferred and in vessels of the purchasing belligerent ("cash and carry" clause) is a typical compromise shaped with a view to particular circumstances; circumstances which did not apply, for example, in the Sino-Japanese war.

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[1] J. B. Scott, *International Conciliation*, Sept. 1935.

[2] On this development, with regard to American Neutrality, see Bottié, *Rev. de dr. int.* (Lapradelle), 1937, pp. 82, 123 *et seq.*

In this field—neutral trade in other than war materials proper—it is not yet possible to indicate more than the tendencies of legal development. What can be said with confidence, is that, for the question of international state responsibility, the differences between opposing political and economic systems—otherwise so important—are not considerable. The tendency to bring the international radiation of every walk of public life under government control because of the vastly increased political importance which economic and financial movements now possess is one common to fascist, socialist, and democratic governments alike, although perhaps not to the same degree.

Uncontrolled international capitalism, for which the customary rules of international law are suited, has lost power, for reasons upon which it is no concern of this article to enlarge. The circle of international relations which are, from the point of view of public international law, "no-man's-land"[1] is steadily decreasing. Until this tendency has crystallized and hardened into a more definite usage, there can hardly be any settled law. In practice, the only way to avoid conflicts will be through international agreements adopted *ad hoc* which may possibly help to shape new customary rules. Given a continuation of the present development, the future neutrality would therefore have to be conceived as one of complete abstention from relations with belligerents, the neutral state controlling the international side of every sphere of public life. This would be almost the exact counterpart of the policy of international sanctions as envisaged by the League Covenant.

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[1] Cf. Bottié, *l.c.*

What effect would such an extension of neutrality have upon the structure of international relations? What has been discussed here as a logical result of the extension of state control over matters formerly not subjected to it, has sometimes been advocated as a desirable object of international politics: the isolation of war. Although such isolation may be the immediate result of a neutrality based on strict abstention, the consequences would have a far wider reaching effect. Such neutrality would lead to an even greater hegemony of strong industrial powers—all aggressor states in recent times have of necessity been such powers—and nations predominantly rural or bent mainly on peaceful occupations, will be compelled either to seek alliance with or the protection in some other way of a powerful industrial state, or else to store up huge quantities of war materials in time of peace, or, finally, to develop their own war industry. The Sino-Japanese war affords a vivid illustration of such a position. It is unlikely that in an international society which is in any way dependent on international trade, such a state of affairs will maintain itself for long. Whether it will do so, it is not the lawyer's concern to forecast. It should be pointed out, however, that the particular object of our inquiry would not be affected by another swing of the pendulum, back to collective international action. Planned society, composed of a number of states with a high measure of social control and organization, is equipped either for intense nationalism or for intense internationalism. The choice between them is a matter of politics. What appears certain is that the mixture of political nationalism and international economic private interests, which was so important a factor in the failure of the League of Nations, is gradually disappearing, and with it that part of international law which limited international state obligations to a minimum, leaving the rest as a "no-man's-land", open to the free play of economic forces.

Other neutral duties

What has been said about trade applies to other duties of a neutral state based on a similar division between the responsibility of the state and that of the individual.

1. It is an established customary rule that a neutral state need not prevent subscriptions on its territory to loans for belligerents, whereas, of course, the neutral state itself must not give financial assistance to belligerents.[1] Loans were raised in neutral territories in all the major wars of the nineteenth century. As international financing passes under state control—a control existing to-day in many states through national currency control or international currency agreements—that distinction loses its meaning. The legal arguments are here substantially the same as with regard to international trade.

2. It is a customary rule of neutrality, confirmed in Article 6 of Convention No. V concluded at The Hague in 1907, that a neutral state need not forbid individual citizens from volunteering for a belligerent, but that the state must not allow organized forces to depart from its territory to assist a belligerent, let alone organize them itself. This rule presupposes a community in which an individual may make a decision, such as volunteering for a foreign war on his own responsibility, independently of his government. That this condition no longer exists generally among the members of the family of nations became obvious in the Spanish Civil War. There can be no volunteers, in the sense of the customary law, from totalitarian states. Even such individuals as actually offer their services voluntarily lose the character of volunteers when they are organized in military formations under government supervision on neutral territory.[2] These "volunteers" are in a different position from those coming individually or in unofficial groups from countries where that is still possible. In the case of Spain, the only way out was an agreement by which the conflicting positions could be adjusted to each other. Again, the non-totalitarian states provided the adjustment by prohibiting any volunteering of their subjects or citizens (i.e. going beyond their international obligations).[3]

3. Finally, the rule that a neutral state, while itself prohibited from rendering transport service to a belligerent, need not prevent its citizens from doing so presupposes that means of transport are not nationalized or, in some other way, subject to government control. No new problem arises here which has not been discussed above.

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[1] *Oppenheim*, 5th ed., Vol. II, § 352.

[2] Cf. McNair, *Law Quarterly Review*, 1937, p. 497.

[3] Whether the British Foreign Enlistment Act, 1878, applied, was doubtful (cf. McNair, *l.c.*, p. 494.

III. *Other Changes in the Relations of State and Individual and their Reflection upon International Law*

The intrusion of the state into economic life is not the only process of international significance which has changed the respective positions of state and individual. Along with the liberal conception of freedom of trade went a more general and perhaps even more firmly entrenched conception of personal freedom from state interference. The prevalent conception, reflected in some rules of international law which will be discussed below, was that the individual was free in his movements and actions, except so far as the protective functions of the state required. To-day the position is rapidly being reversed. The principle of totalitarian government, which to-day rules at least four to five hundred million people, is that the individual lives primarily for the state, and that his liberty of action survives only in so far as compatible with state demands. Such principles involve the suppression of that freedom of speech and criticism which international law at present assumes to exist. Other states, non-totalitarian in principle, are adopting a similar attitude, at least in so far as international relations are affected. The field of politically important human activities is steadily becoming wider.

The rules affected by the change in the scope of government with its consequent reduction of the freedom of the individual can best be summarized under two heads:

1. State responsibility for acts other than government acts injurious to foreign powers.
2. State responsibility for hostile propaganda against foreign powers.

The two questions overlap to some extent, but are nevertheless best treated separately.

1. For international delinquencies committed by individuals the state bears, under customary law, only what is called by some writers "vicarious" liability.[1] It is only under an obligation to use due diligence to prevent an individual from committing an injury against a foreign state.[2] It is submitted that this rule requires no alteration and is essentially sound, even in a society of states with strongly increased state control. The range of injurious acts is infinitely great, and the most totalitarian state cannot fully control the movements of many millions of indi-

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[1] *Oppenheim*, Vol. I, sec. 164.

[2] Borchard, *Diplomatic protection of citizens abroad*, secs. 86–7.

viduals. On the other hand, the "due diligence" required of every state in the supervision of its citizens may, on the circumstances of the case, make the proof of guilt easier against totalitarian states than against others. The last few years have given abundant proof that totalitarian states by various means strictly control the activities of their citizens, especially abroad. This will, in many cases, create a prima-facie evidence of responsibility. Dr. Lauterpacht[1] has stressed the parallel between the responsibility for hostile acts of individuals in times of peace and the corresponding responsibility of a neutral state. But it is submitted that the parallel is not absolute. Neutrality duties cover a limited range of activities, involving the control of trade, transport, and frontiers. For a state to assume such control at all times is possible, but the range of injurious acts is unlimited, and nothing more than due diligence can be required.

2. It is far more difficult to determine the extent of state responsibility for unofficial collective actions. A distinction between private individual acts and private collective action should be made. Collective action, such as boycotts organized by powerful organizations or public opinion, cannot remain hidden from a government. Boycott, in a world deeply divided by conflicting ideologies but no longer willing to rely on organized international sanctions, is likely to become an instrument of political opinion of increasing importance.

The first question is under what circumstances a boycott against foreign trade constitutes an international delinquency regardless of the question of state responsibility. The question is not easy to answer, as every student of the English law of conspiracy will realize, and not much attention has been given to it by international lawyers. Bouvé,[2] by analogy with the prevalent English doctrine on conspiracy, sees the decisive test in the element of coercion, the compulsion of a member of the public through combined action of other compatriots to withdraw his trade from the victim of the boycott. It is difficult to imagine how any boycott could be quite free from such coercion. Needless to say, the coercion must be unlawful coercion. A majority decision of a trade union binding dissentient members and carried out in an orderly manner certainly contains no unlawful coercion. It is not the purpose of this article to discuss the definition of boycott. Suffice it to say that it presents some difficult problems.

[1] *American Journal of International Law*, 1928, pp. 105–30.

[2] *Ibid.*, 1934, p. 24.

Within the scope of this article another aspect of the question is of special importance, namely, within what limits a state is responsible for internationally injurious boycotts. This has recently been discussed by some writers.[1] Dr. Lauterpacht states with emphasis the orthodox rule that governments have in no circumstances a responsibility for acts of other than state organs, even if the latter are parties as closely associated with the government as the Communist party in Russia, the Fascist party in Italy, or the Kuomintang in China. "To make the latter (i.e. states) responsible for the acts of the party would mean to play havoc with the established rules of state responsibility." "Rules of international law in the matter of state responsibility are based on the separation of the state from the individuals and associations of which it is composed."[2] But there is nothing sacred in these established rules, especially if their basis, the separation of state and individual, has disappeared, and it is better to play havoc with them than to maintain an old rule completely out of contact with political reality. Since 1933 the theoretical and practical interdependence between state and party in totalitarian states has become too evident for doubt. Indeed, internal legislation expressly attributes state functions to the one recognized party.[3] To consider a party which is integrally associated with the state or, in some ways even controls the state, as an "individual, for which the state bears no responsibility" would indeed play havoc with elementary rules of international relations. As long as the state is the recognized organ of international intercourse, it must bear that measure of international responsibility which corresponds to its real control, regardless of the names which are chosen for it.[4]

On the other hand, it should be clear that in communities where there exist opposing parties or organizations such as trade unions which determine their own policy and are not mere organs of a corporate state, the state cannot bear a responsibility for their actions, unless it directly or indirectly supports them.

The result is undoubtedly, from the point of view of international law, an unequal measure of responsibility. Boycott in totalitarian states cannot take place without state support, in other states it can. State responsibility varies accordingly and threatens the equilibrium of international obligations. Nor is it possible, in this field, to indicate a solution as it was possible in the realm of economic control. We have seen that state control of economic international relations is an almost universal process, largely independent of forms and theories of political government. International agreements between states with widely different political systems are possible, and have been concluded in that field. New customary rules may emerge. But the situation is different when it comes to the control of political opinion in the state. That goes to the root of political principles. To assume responsibility over boycotts organized by sections of public opinion would mean for a democratic state the abandonment of democracy altogether. It cannot be done as a matter of principle. The international inequality of position in this respect is inevitable, and certainly one of the factors which contribute to the disintegration of the family of nations and the formation of homogeneous groups.

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[1] Lauterpacht, *British Yearbook of International Law*, 1933, pp. 125–40; Preuss, *American Journal of International Law*, 1934, p. 667; Bouvé, *ibid.*, 1934, pp. 29 *et seq.*

[2] Lauterpacht, *l.c.*

[3] See e.g. for Germany: *Ges. zur Sicherung der Einheit von Partei und Staat*, v. 1. 12. 33; *Ges. gegen heimtückische Angriffe auf Staat und Partei und zum Schutze der Parteiuniform*, v. 20. 12. 14; for China: Buenger, *Zeitschr. f. Öff. Recht u. Völkerrecht*, 1936, pp. 286–302.

[4] See also Preuss, *l.c.*, pp. 649–68.

2. State responsibility for hostile propaganda against foreign governments presents, both in practice and in theory, some special problems. Indeed here again there is the basic difficulty of adjusting the position of states which maintain freedom of criticism to that of those which do not. But propaganda (with international effect) is mainly carried on by two means: Press and Radio. Of these the first developed in an age of private enterprise and responsibility, the second at a time when state responsibility for an institution of such vast international potentialities was already generally recognized.

(*a*) *Press propaganda*

The press has grown up as, and for centuries has been considered as, a private and independent institution, and although it has entirely lost this character in totalitarian states (despite the maintenance of a certain external variety), it has preserved it in other countries. Control of the press in these latter countries would be considered as unconstitutional and unbearable. The gap is undeniable. Difficult as it is to assess the exact amount of state control in states like Germany, Italy, or Russia, it is certain that press attacks on foreign countries made by these countries have the support of the government, whereas the French or the British Government could not in any way be identified with utterances made by a paper, however influential. It would be idle to hope that general international rules could develop under such circumstances, except by bilateral agreement, of which we have witnessed some recent examples.

(*b*) *Broadcasting*

Radio took its place in the social life of the nations at a time when the liberal conception of state government had already largely disappeared and the radius of government activities was much greater. Nevertheless, broadcasting was organized in the different countries in different ways. Nowhere, however, did a government exclude the possibility of some control, either by direct administration, by financial subsidies, or by a concession system. It soon became evident that Radio was a powerful instrument of international politics, and these two factors together probably brought about an international convention which, from the point of view of this article, must be regarded as a landmark in the development of international law. It shows the extent to which states regardless of their political creed are compelled to assume a responsibility which they would never have assumed before the war, and which many of them would still refuse to undertake with regard to the press.

The International Convention concerning the Use of Broadcasting in the Cause of Peace was signed on September 23, 1936, by twenty-five nations, among them Great Britain, France, and Russia, but not by Germany and Italy. It is worth while studying its provisions in some detail.[1] Articles 1 and 2 impose upon the contracting parties the general obligation to prohibit and, if necessary, to stop within their territories the broadcasting of transmissions which would be detrimental to good international understanding, or likely to incite the population of any of the other territories to war with another contracting party, or incompatible with the security and order within its territories. Article 3 defines what, in determining the general vicarious liability of states, would be called "due diligence". It imposes upon the parties an obligation to prohibit transmissions of statements the incorrectness of which is or ought to be known to the persons responsible for the broadcasting, and furthermore stipulates a positive duty of verification of all statements concerning international relations. Article 5 is of some significance in that it imposes upon the contracting states a positive duty of fostering international relations instead of the purely negative duties that generally characterize legal interstate relations. It embodies an obligation to supply to another contracting party, on request, information which facilitates broadcasting calculated to promote a better knowledge of the civilization and the condition of life in the party's own country as well as of the development of his international relations and his contribution to the organization of peace. Whether that provision will remain a dead letter, it is not yet possible to say. Article 6 is of special significance for the theme of this article. It says:

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[1] See *Official Journal of the League of Nations*, 1936, p. 1437.

> "In order to give full effect to the obligation assumed under the preceding articles, the High Contracting Parties mutually undertake to issue, for the guidance of governmental broadcasting services, the appropriate instructions and regulations and to secure their application by these services.
>
> "With the same end in view, the High Contracting Parties mutually undertake to include appropriate clauses for the guidance of any autonomous broadcasting organisation, either in the constituting charter of a national institution, or in the conditions imposed upon a concessionary company, or in the rules applicable to other private concerns, and to take the necessary measures to ensure the application of these clauses."

Article 7 provides for the submission of all disputes to peaceful settlement, by conciliation, arbitration, or judicial decision.

Article 6 shows: firstly that, for a modern public institution like broadcasting, that measure of state control which is necessary to regulate its international use is generally assumed; secondly, that it is possible for states to assume such increased international responsibilities while preserving wide differences in their internal social structure. Broadcasting may be operated as a government service, as a public corporation, or as a private company subject to concession. In each case the state is in a position to make its international obligations effective. This is a fact from which some encouragement might be derived for the development of new international legal rules. The increase of state control over more and more spheres of life is a universal phenomenon. But it is compatible with a great measure of divergence in the ways in which this control is exercised internally. There is no doubt that the convention might easily be made universal, as far as the necessary measure of state control goes. If major powers, such as Germany, Italy, or Japan, have not become parties, it is entirely due to political reasons, not to their inability to exercise an adequate control over their broadcasting services. The universality of international law is to-day threatened by disagreement on fundamental political values, much more than by discrepancies in state organization.

IV. *Conclusions*

This concludes a survey—not meant to be exhaustive—of those rules of international law which, in the present author's opinion, are most strongly affected by the new conception of state functions which is replacing the liberal conception. In conclusion, two general theoretical observations may be added.

1. While state control was limited to comparatively few and well defined functions, public international law remained a thin structure covering only a small sector of international relations and leaving most of them outside the law. In this "no-man's-land" a considerable divergence in the ways of government and of social life was possible and harmless from the point of view of public international law. As the state takes charge of further matters, formerly left to private control, the sphere of public international law becomes increasingly comprehensive. With that, the number and types of relations on which there must be some measure of agreement between the members of the family of nations will increase. This latter fact may and does already severely test the universality of the law of nations. This development, as well as the gradual elimination of individual liberty in national and international life, may be profoundly distasteful to international lawyers schooled in a different conception of political life. But it is not for the lawyer to determine the political and social structure of the society which provides the basis for legal rules. The law cannot ignore social change beyond a certain point, for no law can command respect which bases its rules on the society of yesterday. One comfort, however, the lawyer may derive from a thorough investigation of the ways in which the concentration of more and more power in the hands of the state reflects on international law; it does not affect the issue between the supremacy of international or of national authority as the basis of international law. For a nationalist world state power is the final word, for an internationalist world it is a necessary preliminary stage towards a fuller regulation of international relations.

2. International law may develop and change in different ways. Legislation is an instrument suitable, on the whole, only for a stabilized and ordered society. Nor can the case law of international tribunals contribute as much as it should do in a quickly changing society, the members of which do not submit the vital questions at issue between them to a court. The pre-

dominant instrument of legal development in such a society is the law-making treaty, from which, in the course of time, new customary law may emanate. In the present state of affairs such new law will be predominantly partial, evolved between states bound by common ties. Whether, in course of time, new universal rules will develop or several international groups with legal rules of their own will be the result, only the future can show.

Summary

1. The present international rules of state responsibility are based on a particular division of the functions of the state and of the individual.
2. The growth of state control over spheres formerly reserved to the individual has now proceeded far enough within the great majority of states to make these rules unworkable.
3. In the question of state immunity before foreign courts, practice and theory have been faced with the problem, but have not given a uniform answer. The governing principle should be not to extend state immunity to new spheres formerly outside the domain of public international relations, so as to avoid creating discrepancy between rights and duties.
4. In the question of state responsibility in general (neutrality, international delinquencies, hostile propaganda), the main problem, in a society of states with different degrees of state control, is how to preserve the principle of equality of obligations without ignoring the fact that increased state control means an increased field of public international relations, and thereby greater international state responsibility.
5. In the matter of export of war materials, state control has become sufficiently definite and universal to justify the substitution for the old rule of a new rule of abstention. Recent international conventions have prepared this change.
6. In other matters—notably trade in goods other than war materials, control of individual and collective movements and actions (such as volunteering, boycott, propaganda)—state control has also proceeded so far, though under such various forms and with so many different degrees of intensity, that the old rules no longer operate. New general rules have not yet been formed. In the meantime, partial law-making treaties will bridge the existing gaps in particular cases. Notable examples are the Non-Intervention Agreement, 1936, and the Broadcasting Convention, 1936.

7. The increase of state control over international relations of all kinds is a universal feature, largely independent of any particular political system. The inclusion of new spheres in the domain of public international law increases, however, the measure of agreement on fundamental social and political values necessary as a basis of international agreement.

IMMUNITY OF THE SUBORDINATE PERSONNEL OF A DIPLOMATIC MISSION

By S. H. BROOKFIELD, M.A., LL.M.

THE decision in the case of *Engelke* v. *Musman*[1] is to some extent an affirmation of the principle expressed many years ago by Sir Mathew Hale, who said:[2] "The business of ambassadors is rather managed according to the rules of prudence and mutual concerns and temperaments among princes, where possibly a severe construction of an ambassador's actions, and prosecution of them by one prince may at another time return to the like disadvantage of his own agents and ambassadors." The submission of the Attorney-General in this case contains the following paragraph, which is set out in the report of the case (at p. 435) and was approved, at any rate impliedly, by the judgments of the court:

> "The Attorney-General submits that it is a necessary part of His Majesty's prerogative in his conduct of foreign affairs, and his relations with foreign states and their representatives to accord and to refuse recognition to any person as a member of a foreign ambassador's staff exercising diplomatic functions. For this purpose, a list of the members of his diplomatic staff is furnished from time to time to the Secretary of State by every foreign ambassador. This list is not accepted as of course on behalf of His Majesty, and after investigation, it not infrequently happens that recognition is withheld from a person whose name appears upon the furnished list, either because his diplomatic status is in doubt, or because the number of persons for whom that status is claimed appears to the Secretary of State to be excessive."

Thus the principle has been established by the highest court in England that claims to diplomatic status must be decided by the Foreign Office, since it alone can give due weight to questions of expediency and policy. This change in the authority giving the decision brings also a change in the time at which such claims are decided, which was formerly the date when matters affected by the question of diplomatic status were brought before the court, but now becomes the date when the name of a particular individual is submitted to the Foreign Office as a member of the personnel of a diplomatic mission. It seems clear, however, that the basis of law and practice applicable to decide whether that individual should be accepted or not, remains the same. The purpose of this study is to examine the existing law as laid down in cases earlier than *Engelke* v. *Musman* and as deducible from the practice of the Foreign Office, with a view to establishing what this basis is, and to stating what appears to be the doctrine of certain other countries.

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[1] [1928] A.C. 433.

[2] Quoted in *American Journal of International Law*, 1937, p. 464.

In his judgment in Musman's case, Lord Phillimore surveyed the subject of diplomatic immunities from an historical point of view, and found the beginnings of such a basis in the famous Act of Anne (7 Anne, c. 12) which is generally taken to be declaratory of the common law. The privilege enjoyed by the staff of a diplomatic mission is a derivative one, given to the ambassador for himself, his personal family (i.e. his wife and his children if living with him), his "diplomatic family" (i.e. his counsellors, secretaries, and clerks, termed "domestics" in the Act), and his servants, termed "domestic servants" in the Act. Servants receive a protection lesser in degree than the "diplomatic family" by reason of the provisions of Section 5 of the Act, which exempts from its benefits any merchant or trader who shall put himself into the service of any ambassador or public minister.

Pausing for a moment to consider the position of servants, a term which presumably includes all persons regularly employed by a foreign mission who cannot bring themselves within the "diplomatic family", it appears that their privileges, personal and jurisdictional, are limited to matters arising out of their service, and that no general immunity is accorded to such persons. Sir Cecil Hurst discusses this subject in his Course on Diplomatic Immunities, prepared for the Academy of International Law in 1926.[1] He cites with approval the case of *Novello* v. *Toogood*,[2] which dealt with the privileges to be accorded to a chorister of the Portuguese Embassy. In this case it was said by Abbott C.J. that "whatever is necessary to the convenience of the ambassador, as connected with his rank, his duties, and his religion, ought to be protected; but an exemption from the burthens bourne by other British subjects ought not to be granted in a case to which the reason of the exemption does not apply".[3] It seems clear, too, that such privilege as a servant has is lost by dismissal, even as to acts committed by him when he was such a servant. English law apparently makes no distinction between servants who are subjects of the sending state and those who are British subjects.

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[1] *Recueil des Cours*, Vol. XII (1926), pp. 201 *et seqq.*

[2] 1 B. & C. 554 (1823).

[3] At p. 562.

The personal and jurisdictional privileges accorded to members of the "diplomatic family", on the other hand, have always been held to be as extensive as those accorded to the ambassador himself. The question of the tests to be applied to determine whether an individual forms one of this class is therefore of importance. Scrutton L.J., in the case of *Fenton Textile Association* v. *Krassin*,[1] felt it to be of such importance that he expressed himself as unwilling to decide it unless the facts of the case required it, which they did not. Moreover, it has of late become of even greater moment than it was at the time of that judgment, in view of the expanding views of some governments as to the proper functions of the state, and therefore of diplomacy.

The cases decided by English courts before *Engelke* v. *Musman* suggest that it is to the functions of the particular official whose privilege is in question that attention must be directed, rather than to his title. Thus, in *Barbuit*'s case,[2] which was said by Lord Mansfield[3] to have been decided "on considering and well-weighing Barbeyrac, Binkershoek, Wincquefort, and all foreign authorities", Talbot L.C. said: "It has been said that to make him [Barbuit] a public minister, he must be employed about state affairs. In which case, if state affairs are used in opposition to commerce, it is wrong; but if only to signify the business between nation and nation, the proposition is right; for trade is a matter of state, and consequently a proper subject for the employment of an ambassador." Barbuit was held not entitled to privilege because he was not instructed to transact business between the two Crowns (i.e. Prussia and England), but on the authority of this case rests the grant of immunity to commercial secretaries and attachés.

Parkinson
v
Potter

In the case of *Parkinson* v. *Potter*,[4] Willes J. held that provided diplomatic functions were performed, i.e. that the person whose privileges were in question was "a person treated at the Embassy as a member of the legation, possessing in diplomatic matters more or less of the confidence of the Minister, and employed from time to time by him in the work of the legation", it was not for the court to measure the quantum of services either required from or rendered by him. Nor did a combination of consular duties with these affect the position. The party concerned in this case was consul-general of Portugal, and evidence was given in the County Court, on which the judge had found that he was also an attaché at the Embassy: and the Divisional Court refused to disturb that finding.

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[1] 38 T.L.R. at p. 262.

[2] Cas. temp. Talbot. 281.

[3] In *Heathfield* v. *Chilton* (1767), 4 Burr. 2016.

[4] (1885), 16 Q.B.D. 152.

So too, in *Assurantie Compagnie Excelsior* v. *Smith*,[1] the chief of the mail department at the United States Embassy was held entitled to privilege. He seems to have been considered, in the Court of First Instance, rather as a servant than as a member of the "diplomatic family", being described by McCardie J. as an "amanuensis". The evidence, however, showed that he was in a position of great confidential importance, and Scrutton L.J. held on the appeal that "he was on the official staff of the Embassy, carrying out official duties". The action was for calls on shares, and it would seem that if he had been merely a "domestic servant" he would have been liable, on the principle laid down in *Novello* v. *Toogood* before cited.

In *In re Cloete*,[2] the production of a certificate from the Persian ambassador that the respondent was an attaché of the Embassy did not avail to procure the setting aside of a receiving order made against him, in the absence of evidence of recognition by the Foreign Office, or of performance of acts with regard to the British Government usually done by attachés. Evidence was given that Cloete had performed duties at the Embassy usually done by attachés, and this case seems to be to some extent inconsistent with *Parkinson* v. *Potter*, but it is submitted that the criterion adopted was the right one, i.e. that the court (and therefore now the Foreign Office) is entitled to go behind the statement of a minister or his government as to the functions of a member of the mission. It should be noted, however, that in this case there was a strong suspicion that the appointment had been obtained fraudulently; and that the debtor was a British subject.

As *Barbuit*'s case shows, the conception of diplomatic functions is not a static one, but widens to embrace fresh spheres which are the subject of intercourse between governments. Thus air attachés have become usual members of a mission since the development of aerial communication and air forces. Agricultural attachés have been appointed by the United States of America and by many European governments for collecting information as to agricultural methods and generally promoting the productivity of their countries. Attempts by certain foreign powers to appoint "labour attachés" and "cultural attachés" to Great Britain have, however, been resisted, it is understood, chiefly on the ground that exercise of the functions which these attachés were intended to discharge would interfere with the internal affairs of this country. Similarly, when the United States in 1925 wished to appoint Treasury officials as members of their mission to collect information which seemed likely to be used in applying the United States customs tariff to the products of this country, diplomatic status was refused because the duties assigned to these officials appeared to arise from the domestic legislation of the United States, and to be of a purely administrative and fiscal character. As was said by Sir Cecil Hurst in the lectures previously referred to, "the principle which should be adopted is that a government can refuse to accord diplomatic privileges to an agent who is sent to its territory by a foreign government on business which only concerns the internal affairs of the latter".[1]

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[1] 40 T.L.R. 105 (1923).

[2] 7 T.L.R. 565 (1891).

From the cases cited, therefore, and from a consideration of diplomatic practice in this country, it seems that before diplomatic privileges and immunities are granted to a person put forward as one of the official personnel of a foreign mission, it must be shown that his proposed functions are:

(1) concerned with relations between nation and nation, and not with sectional or party interests, and

(2) not such as to necessitate interference with the internal affairs of the country to which he is accredited. These matters must be judged by the receiving state, and though great weight will naturally be attached to the legislation or diplomatic regulations of the sending state, they cannot be considered conclusive. Thus, in the case of the American Treasury officials already cited, there was in existence an Act of Congress[2] which stated that these officials were to be entitled to diplomatic privileges, but this did not affect the attitude finally adopted by the British Government.

There is also a third subsidiary test, which may be called that of venue. A foreign mission can only have one "seat", and if it appears that a person for whom privilege is claimed is to reside and carry on his work at a distance from that seat, this fact in itself is almost conclusive evidence that his functions are not diplomatic.

A practical difficulty arises, in applying these tests, in that it is difficult, without giving offence, to inquire as to the proposed functions of a person sent by a foreign government in one of the recognized categories of diplomatic posts (i.e. as counsellor, secretary, or attaché), especially if that government is one which holds the doctrine that the distinction between diplomatic and non-diplomatic posts is formal and not functional. It is submitted, however, that the functional test has become part of the common law of England in the same way as, say, the English conception of domicil, and that questions of international courtesy must be judged against English legal standards. It would be intolerable if foreign agents calling themselves "secretaries", or "attachés", were allowed to interfere with the internal affairs of this country, while remaining immune from civil and criminal process here by reason of an automatic inclusion in the Foreign Office diplomatic list as members of the official staff of a mission. Fortunately, the size of a mission is more easily scrutinized than the functions of its members, and while replacements may perhaps be allowed to pass without comment, each new addition to the staff of the mission should without giving offence form the subject of an inquiry as to functions.

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[1] *Recueil des Cours*, Vol. XII, p. 155.

[2] No. 321 of 68th Congress.

It has been said that some states do not admit the necessity, or indeed the possibility, of a scrutiny of functions. They maintain that a receiving state must accord diplomatic privilege to all persons whose names appear on the list of official personnel submitted to them by the sending state, and that that state can only object on the ground that a particular person is *persona non grata*, or on the ground of the excessive size of the mission, without reference to functions, which must remain entirely at the discretion of the sending state.

This appears to be the position in Germany. The grant of immunity there depends on the provisions of Sections 18 and 19 of the Law of Organization of the Courts of January 24, 1877, which exclude from the jurisdiction of any German court the heads and members of diplomatic missions, their administrative personnel, and such domestics of these persons as are not Germans. In a case decided in December 1926 by the Oberlandesgericht of Darmstadt, it was said that a subordinate member of a legation enjoys the privileges of exterritoriality as from the time of his appointment, and loses them only when the receiving state no longer wishes to receive him and notifies the sending state accordingly.[1] This opinion was said by the court to be in accordance with the practice of the British courts, and it seems that the case of *in re Cloete* was meant. The whole *ratio decidendi* of that case was, however, as has been shown above, that Cloete never had diplomatic immunity, though there was no doubt about the fact of his appointment as attaché by the Persian ambassador.

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[1] *Zeitschrift für Int. Recht*, Vol. XXXIX, p. 284.

The notes to this case in the *Annual Digest of Public International Law Cases for 1925–26*[1] emphasize that the declaration of the sending state alone is relevant in establishing exterritoriality, and this view is also expressed by Professor Hans Wehberg in an article in the *Journal de Droit International et de Législation Comparée* entitled "L'Exterritorialité du personnel non-officiel des Légations".[2] He states what may be taken to be the German viewpoint as follows:

> "The right of exterritoriality commences from the moment of nomination by the Head of the Mission. The insertion in a list and the communication of the nomination to the government of the state of residence is, indeed, diplomatic practice, but it is without effect on the creation of the privilege of exterritoriality. No confirmation is necessary from the state of residence, either formal or tacit, of the nomination. The silence of the state of residence after communication of the nomination of an official of a Legation simply permits the inference that that state does not intend to raise any objection against the person of the nominee. Any objection can, in any event, have but one object—to request the Head of the Mission to cancel the nomination."

It should be noted also that the decision of the German Foreign Office as to questions of exterritoriality does not bind German courts.

The position in America is not very clear. The grant of diplomatic immunities rests on the authority of Article 4063 of the Revised Statutes, which agrees almost word for word with the English Act of Anne. The compilers of the Convention on Diplomatic Privileges produced by the Harvard Research in International Law apparently accept the formal test as opposed to the functional. They state:[3]

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> "Customary international law has established no standard by which diplomatic missions can be clearly distinguished in all cases from non-diplomatic missions on the basis of differences in their respective functions. . . . In view of the expansion of diplomatic activities, it seems unwise to attempt a precise definition of diplomatic functions, by conventional regulation. The right of a receiving state to refuse 'agréation' or to acquiesce in the attachment of members to the personnel of an accredited mission constitutes a safeguard against a tendency for the sending state to invest with diplomatic character persons whose functions depart too widely from those traditionally considered appropriate to diplomacy."

There is cited in support of this contention the case of Mr. Hitz, the political agent and consul-general of the Swiss Confederation at Washington, who in 1868 was "stricken from the diplomatic list" on the ground that his title was one of a class unusual in public intercourse between states, and not referable to any of the recognized grades of diplomatic intercourse.[1]

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[1] At p. 323. [2] 3rd Series, Vol. VII (1926), p. 360. [3] At p. 43.

Articles 8 and 10 of the proposed Convention run as follows:

> 8. A sending state may send as a member of its mission other than the chief of mission any person to whom no objection is made by the receiving state; provided however that a sending state may not send as a member of a mission a national of the receiving state without the express consent of the receiving state.
>
> 10. A sending state may send or employ as members of the administrative personnel or service personnel of its mission any persons to whom no objection is made by the receiving state.

The Havana Convention adopted by the Sixth International Conference of American States in 1928 also provides in its Articles 10 and 14:

> 10. Each mission shall have the personnel determined by its government.
>
> 14. Diplomatic officers shall be inviolate as to their persons, their residence, private or official, and their property. The inviolability covers: (*a*) all classes of diplomatic officer, (*b*) the entire official personnel of the diplomatic mission. ((*c*) and (*d*) servants, &c.)

A consideration, however, of such cases as *United States* v. *Liddle*[2] and *In re Baiz*[3] seems to show that the State Department, whose certificate, as in England, is held to be conclusive evidence as to diplomatic status, looks in fact to the functions of the person concerned before deciding whether he shall be entitled to immunity. In the latter case[4] a ruling of Mr. Secretary Blaine of April 12, 1881, was quoted, to the effect that a consul-general who was also accredited as political agent of the same government was not to be regarded as entitled to diplomatic immunities, since he was not performing any acts as such political agent which he was not equally competent to perform as consul-general.

In Russia, the categories of persons admitted to diplomatic privilege besides the minister are defined as "counsellors, first, second, and third secretaries, and attachés", and no persons not designated to one of these posts can enjoy privilege.[5] The question of functions appears to be irrelevant. Among the Soviet's own diplomatic representatives, all ranks have, in theory at any rate, been abolished by a decree of May 22, 1918, so that it is hard to see how a purely formal test could be applied to Russian diplomatic missions. In point of fact, since external trade is a state monopoly under the Soviet system, the status of its trade representatives, and often of other diplomatic officials, is usually regulated by trade treaty. Such treaties generally provide that the head of the trade delegation, and a limited number of his staff, shall enjoy the privileges of the diplomatic corps, but that the Government of the U.S.S.R. recognizes itself as responsible as respects all trade transactions entered into by its representatives abroad.[1]

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[1] Moore, *Digest of International Law*, Vol. IV, pp. 441–3.

[2] 2 Wash. C.C. 205.

[3] (1890), 135 U.S. 403.

[4] At p. 424.

[5] Taracouzio, *The Soviet Union and International Law*, p. 179.

In France, a Decree of 13 Ventôse, An II, forbids "interference in any manner with the persons of envoys of foreign governments", and provides that claims against them shall be made to the Committee of Public Safety. This provision has been extended by the jurisprudence of the courts to include all persons officially forming part of the Legation.[2] The case of *Dientz* v. *de la Jara*[3] speaks of "all persons whose presence is necessary to permit the ambassador to represent his country worthily, and to accomplish his mission fully"; but no guidance is given by this or the other cases as to who is to be the judge of this necessity. The diplomatic list kept by the French Ministry of Foreign Affairs is accepted as evidence of immunity, as is shown by the case of *Drtilek* v. *Barbier*,[4] but apparently it is not conclusive, since it was said in that case that even if the defendant's name had appeared there, he had waived the immunity by applying to the court himself. It seems probable that French courts would hold themselves free to go behind the Ministry's list on other grounds, as English courts did before the decision in *Engelke* v. *Musman*.

Italian courts have recently evolved a jurisprudence restrictive of diplomatic immunities, to accord with their views on the liability of foreign states to suit in respect of all matters which can be considered as *actes de gestion* rather than *actes de pouvoir*. As was said by the Court of Rome in the case of *Cimino Bosco* v. *Escheveri*,[5] "the old theory of the exterritoriality of diplomatic agents has been abandoned, and replaced by another more correct doctrine. . . . Not only the families, but also the diplomatic agents themselves are subject to the territorial laws and to the jurisdiction of our courts in regard to all questions of private law concerning their persons, except where the agents have acted as representatives or at the order of the foreign state". Inclusion in the diplomatic list is therefore of little or no consequence in

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[1] See (e.g.) Treaty with Lithuania of Aug. 29, 1931, Art. 10.

[2] See especially the decision of the Court of Cassation of Jan. 10, 1891, reported in *Clunet*, 1891, Vol. XVIII, pp. 157 *et seq.*

[3] *Clunet*, 1878, Vol. V, p. 500.

[4] *Clunet*, 1926, Vol. LIII, p. 638.

[5] *Riv. Dir. Int.*, Vol. XXIII (1931), p. 563.

Italy, since the courts will always assume jurisdiction to decide whether the suit concerns a private act or not, and if it does, will give judgment notwithstanding the diplomatic status of the defendant.[1]

Returning now to English law and practice, while it must be recognized that the scrutiny of the proposed functions of a member of a foreign mission is a difficult and delicate task, it seems that since the decision in *Engelke* v. *Musman* it is the only satisfactory method of protecting the receiving state against unwarranted extensions of personnel and usurpation of privilege. Though almost every country concedes that a diplomat may be objected to as *persona non grata* at any stage of his career, this, too, is a difficult process, and one which is bound to assume a more personal aspect than a general objection to his functions before he takes up his position. It is submitted therefore that the "functional" test as already applied by this country before a name is included in the diplomatic list is a proper and convenient one, and worthy of universal adoption. The method of objection to an individual as *persona non grata* should only be used where the functional test has proved unsuccessful—as, for example, where, after appointment, the functions of a particular member of a mission are changed, or appear in a different light.

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[1] See *Perrucchetti* v. *Puig y Cassauro* (*Riv. Dir. Int.*, Vol. XX (1928), p. 521).

ABOLITION OF THE CAPITULATIONS IN EGYPT

(*a*) *Introductory*

1. In the 1937 volume (p. 79 *et seq.*) of the *Year Book* an account of the provisions of the Anglo-Egyptian Treaty of Alliance of 1936 was given, including (in paragraphs 4 to 7) a short account of the capitulations in Egypt and of the Mixed Courts and (paragraphs 39 to 40) a summary of the provisions of the treaty with regard to the capitulations. These portions of last year's article should be regarded as introductory paragraphs to the present article and the story is now taken up at the point where the article of 1937 left it. The question of the capitulations was dealt with in the manner envisaged in the Treaty of Alliance and the skeleton scheme contained in that treaty was the foundation of the arrangements concluded at Montreux.[1]

2. On January 16, 1937, the Egyptian Government invited the governments of the capitulatory powers to be represented at a Conference at Montreux on April 12 and followed this communication by another note on February 3 which set out the Egyptian Government's proposals for the "transitional régime"[2]. This invitation was accepted by all the powers, including the Governments of the British Dominions and of India, which by reason of modern constitutional developments may be considered to have become, together with the Government of the United Kingdom, seven governments of one capitulatory power, His Britannic Majesty, the consent of each being necessary to the abrogation of treaty rights in which all shared. The Government of Canada was not represented at the Conference, but addressed a note to the President of the Conference which is included in the Final Act, stating that Canada would "accept the provisions of any convention drawn up at Montreux which was signed and ratified in respect of other members of the British Commonwealth of Nations

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[1] For convenience of reference, Article 13 of the Treaty of Alliance and the Annex to that article (including paragraph XVIII of the agreed minute) are appended as Annex I to this article.

The Convention for the Abolition of the Capitulations in Egypt and the other documents signed at Montreux have been published in the United Kingdom in the *Treaty Series* (see *Treaty Series*, No. 55, 1937), and also by the Egyptian Government. The latter publication contains in addition to the documents included in the former the Report of the Drafting Committee, the Minutes of the Conference, and an introductory note by the Secretary-General of the Conference.

[2] The text of these notes will be found in the Introductory Note to the Minutes of the Conference.

. . . on the understanding that Canada can claim under the convention the same rights as those states in whose respect it has been signed and ratified".

(*b*) *The problem which the abolition of the capitulations in Egypt presented*

3. Before going further, it will be useful to consider very shortly the problem which the Montreux Conference had to solve. In Egypt, partly perhaps owing to the capitulations, but more on account of its geographical position and the nature of the country, foreigners occupy an exceptionally important position quantitatively and qualitatively. Further, entirely owing to the capitulations, foreigners in Egypt have lived for centuries under a special régime, which led to their being organized and administered to some extent in separate national communities and to their being in many respects in a position different from that of the nationals of the country or of foreigners elsewhere. An abrupt change from the position existing in Egypt in 1936 to the régime applied to foreigners in any other country would produce results equivalent to a revolution for the foreigners as well as causing a considerable disorganization of the life and commerce of the country as a whole.

Egypt had for many years been determined to secure, at the earliest possible moment, the abolition of the two essential attributes of the capitulations, namely consular courts and the necessity of the consent of foreign powers for the application of Egyptian legislation to foreigners. But up till and including the treaty negotiations of 1930 at any rate, Egyptian Governments had contemplated the maintenance of the Mixed Courts, exercising certain powers of review over Egyptian legislation as well as the additional jurisdiction taken away from the consular courts, indefinitely—that is to say without fixing any definite term. After 1930, however, owing to difficulties arising out of the exercise of their legislative functions, and more particularly out of their judicial power to pronounce upon the validity of the application of Egyptian legislation to foreigners, the attitude of Egyptians towards the Mixed Courts had become seriously modified and Egypt desired their abolition as soon as possible and was only prepared to agree to their maintenance for a "reasonable and not unduly prolonged transitional period", after which their functions would pass to the national tribunals. The provisions of the Treaty of Alliance showed that in principle the United Kingdom was prepared to accept and recommend to other capitulatory powers this further advance in Egyptian national aspirations.

But it became evident from the Egyptian note of February 3, referred to in paragraph 2 above, that Egyptian aspirations did not stop there. The Egyptian Government desired to introduce immediately certain modifications into the Mixed Courts system itself. These modifications involved the immediate transfer to the national courts of jurisdiction over certain classes of foreigners over whom jurisdiction was at present exercised by the Mixed Courts and a gradual increase in the Egyptian personnel and a decrease in the foreign personnel in the Mixed Courts themselves,[1] with the idea that Egyptian judges and the Egyptian national courts should, during the transitional period, be acquiring some practice and training for the new work which would all have to be taken over by the national courts at the end of the transitional period. It was desired, further, to abolish the important existing Mixed Court jurisdiction under the principle of "mixed interest"[2] and to achieve certain other changes of this kind.

4. The governments of the capitulatory powers accepted as just and inevitable the Egyptian demands for the abolition of the capitulations as they had been formulated by Egypt and accepted in principle by His Majesty's Government in successive proposed treaties of alliance up to and including that of 1930. While viewing with some anxiety the more radical changes to be submitted to them in accordance with the Treaty of Alliance of 1936, they probably did not feel serious difficulty with regard to them provided the transitional period was sufficiently long. But they viewed with considerable alarm the further Egyptian proposals which modified the existing system of Mixed Court organization and jurisdiction, proposals, moreover, which raised points which were not even hinted at in the Treaty of Alliance, or were, at most, only mentioned in that treaty as points to be settled later.

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[1] Hitherto, in the Mixed Courts, there had been a two to one majority of foreign judges over Egyptian judges, and foreign judges alone had the right to preside. In this note it was also proposed that Egyptian judges should be eligible to preside over tribunals and chambers and that an Egyptian should always be either President or Vice-President.

[2] See paragraph 7 of the article in the 1937 volume: this principle brought before the Mixed Courts all bankruptcy cases where any foreigner was interested; all cases affecting companies wherever incorporated in which there was any foreign shareholding; and any action between any parties which affected a foreign interest so that a third party claim might arise out of it by or against a foreigner or which might be made a third party claim to an action before the court. There had been indeed a certain abuse by litigants of this principle in fictitious cessions of interests to foreigners (*prête-nom*), &c.

There was further the question of what other guarantees or undertakings in matters relating to foreigners Egypt should be asked to accept, indefinitely or for the transitional period, in return for the acceptance by the powers of the abolition of the capitulations and of the transitional régime now proposed. There were consequently numerous questions for the Montreux Conference to settle, some of them complicated, legally and otherwise, and many of them involving much detail. The task of the Conference was a far more difficult one than that which would have confronted a conference for the abolition of the capitulations convoked, let us say, in 1931 if the treaty negotiations of 1930 had been successful.

(*c*) *The documents signed at Montreux in May, 1937*

5. By May 8, 1937, the documents were complete, agreement had been reached on all points and all delegations signed subject only to ratification in the ordinary way.[1] The Montreux Conference produced a Final Act covering:

(1) a convention of 15 articles;
(2) a new "Règlement d'organisation judiciaire" (R.O.J.) for the Mixed Courts annexed to the convention (58 articles);
(3) a Protocol interpreting two provisions of the convention and Règlement;
(4) an Egyptian declaration containing certain Egyptian undertakings with regard to seven different matters, some of

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[1] The Conference met on April 12 and dissolved on May 8. The Egyptian Prime Minister, Nahas Pasha, was President of the Conference, which did its work in three committees which never sat at the same time, viz. a Règlement Committee which produced the Annex to the convention, presided over by M. Hansson, Norwegian delegate and former President of the Mixed Court of Appeal, a General Committee, responsible for the Final Act, Convention, Protocol and Declaration, and a Drafting Committee, both the latter being presided over by M. Politis, head of the Greek delegation. By permission of the Secretary-General of the League of Nations, M. Aghnides of the League Secretariat was appointed Secretary-General of the Conference. In the Egyptian delegation, Nahas Pasha was assisted by Ahmed Maher, President of the Chamber, W. B. Ghali Pasha, Foreign Minister, Makram Ebeid Pasha, Minister of Finance, and A. H. Bedawi Pasha, Chief of the Contentieux of the Egyptian Government, as delegates, and in the capacity of expert by Mr. E. W. Besly, acting Judicial Adviser of the Egyptian Government (an office which was abolished shortly afterwards as a result of the Treaty of Alliance (see paragraphs 37, 10, and 22 of the article in the 1937 *Year Book*)).

The United Kingdom delegation was headed by Captain Euan Wallace, Parliamentary Under Secretary of State to the Foreign Office and Board of Trade, assisted by Mr. Kelly, Counsellor to His Britannic Majesty's Embassy at Cairo, and Mr. Beckett, second Legal Adviser to the Foreign Office, as delegates. Amongst the members of the other delegations were several persons who had formerly served in Egypt as foreign judges of the Mixed Courts or as advisers to the Egyptian Government, including MM. Wathelet, Boeg, Linant de Bellefonds, Vryakos, and Messina.

them being supplementary to provisions in (1) and (2) and others being independent;

(5) a series of notes exchanged between the Egyptian delegation on the one hand and certain other delegations on the other hand relating to foreign educational, medical, and charitable institutions in Egypt;

(6) a report of the Drafting Committee which contains some important explanations as to the provisions of (1), (2), (3), (4), and (5);

(7) full minutes of the meetings of the Conference which, in case of ambiguity, would be relevant for the interpretation of (1) to (6) above.

In addition, the Egyptian delegation produced at the Conference a new draft Penal Code and a new draft Code of Criminal Procedure which were to be enacted and applied by the Mixed Courts. As the Conference did not feel called upon to discuss or approve these codes, they do not form part of the proceedings of the Conference. Nevertheless, there are references in the report of the Drafting Committee and in the minutes to certain of their provisions, which complete and explain certain provisions of the new R.O.J.[1]

These documents are fairly voluminous and in discussing the work of the Conference it will be convenient in general to consider the provisions of (1), (2), (4), and (5) in order, and to refer to (3), (4), and (7) where they complete or explain the other provisions.

(*d*) *The abolition of the capitulations*: *non-discrimination*

6. Article 1 of the convention reads:

> "The High Contracting Parties declare that they agree, each in so far as he is concerned, to the complete abolition in all respects of Capitulations in Egypt."[2]

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[1] These new Codes were necessary because the Mixed Courts had hitherto had virtually no criminal jurisdiction. In addition the Egyptian delegation announced their government's intention to abrogate the whole of Titre I of the existing Mixed Civil Code, except for Articles 13 and 14 dealing with the jurisdiction of the Mixed Courts where the parties are outside Egypt. The other provisions of this chapter are obsolete or unnecessary under the new conditions.

[2] The Report of the Drafting Committee on this article observes:

"This provision, which is of a general nature, involves, of necessity, the abrogation of all treaties, instruments, arrangements or usages, which would be contrary to the provisions of the convention.

"In this connexion, the committee wishes to state that a proposal was laid before it to annex to the convention a list (document C.C.M./C.G./3) of the treaties and other international instruments thus abrogated. This suggestion was not followed by the committee, because certain delegations preferred merely to adapt the general formula contained in Article 1, while certain others were not in a position to undertake the examination of the list in question."

Article 2, paragraph 1, reads:

> "Subject to the application of the principles of international law, foreigners shall be subject to Egyptian legislation in criminal, civil, commercial, administrative, fiscal, and other matters."

As a result of this provision the assent of the capitulatory powers is no longer necessary for the application of any Egyptian legislation to Egyptians, and the former legislative functions of the Mixed Tribunals as regards the application of Egyptian legislation to foreigners ceases. The provisions of the old R.O.J. of the Mixed Courts providing for these functions are removed from the new R.O.J. annexed to the convention.

Article 2, paragraphs 2 and 3, reads:

> "It is understood that the legislation to which foreigners will be subject will not be inconsistent with the principles generally adopted in modern legislation, and will not, with particular relation to legislation of a fiscal nature, entail any discrimination against foreigners or against companies incorporated in accordance with Egyptian law wherein foreigners are substantially interested.
>
> "The immediately preceding paragraph, in so far as it does not constitute a recognized rule of international law, shall apply only during the transition period."

The Drafting Committee's report observes:

> "The committee did not think it necessary to make special mention of foreign companies since it considered that these are covered by the word 'foreigners'.
>
> "In the framing of this text, account was taken of the fact that among the principles generally adopted in modern legislations, which are referred to in paragraph 2 of the text, should certainly be included the rule concerning respect for legally acquired rights.
>
> "It is, moreover, understood that the non-discrimination rule set forth in paragraph 2 of the new text, although considered more especially in regard to its application to fiscal matters, is a rule of a general nature.
>
> "The term 'legislation' used in Article 2 is to be taken in the wide sense which it bears in English."

Part I of the Protocol reads:

> "It is understood that the provisions of Article 2, paragraph 2, of the convention relating to the non-discrimination rule and applicable during the transition period must be interpreted in the light of international practice relating to undertakings of that nature between countries enjoying legislative sovereignty."

"International practice", which is referred to here for the purposes of interpretation, covers (*a*) the actual application of non-discrimination undertakings by states enjoying legislative sovereignty which are subject to them, and the representations made by other states enjoying the benefits of such undertakings, and (*b*) decisions of international tribunals expounding the effect of such provisions, in particular the Advisory Opinion of the Permanent Court of International Justice in the case relating to the treatment of Polish nationals in Danzig (Series A/B 44). A consideration of this international practice leads to the conclusions (i) that non-discrimination means non-discrimination in fact as well as in law; artfully designed conditions nominally applicable to all but in fact burdening only foreigners are contrary to it, though the mere fact that a provision such as a tax hits foreigners chiefly does not alone make it discriminatory; (ii) non-discrimination does not mean the same thing as complete equality with nationals in every sphere.[1]

Paragraph 2 of the Declaration of the Egyptian Government reads:

> "With reference to Article 2, paragraph 2, of the Convention and the Protocol relating thereto, the fact that the effect of the non-discrimination rule referred to in the above-mentioned Article 2 is limited to the duration of the transition period, does not imply any intention on the part of the Royal Egyptian Government to pursue thereafter in this matter any contrary policy of discrimination against foreigners. The Royal Egyptian Government is, moreover, prepared to conclude Establishment Treaties and Treaties of Friendship with the various powers."

The transition period is fixed in a later article as a period of twelve years.

There are some kinds of differentiation between nationals and foreigners which are prohibited by general international law, but others which are legitimate unless forbidden by treaty. The view therefore which prevailed at the Conference was that it was reasonable in return for the surrender of capitulatory rights (including the principle of non-application of Egyptian law to foreigners) for Egypt to enter into a unilateral undertaking for general non-discrimination for the transition period of twelve years. During that time the other powers could conclude with Egypt detailed "establishment" treaties by which this matter is usually dealt with between states on a basis of reciprocity. At the end of the twelve years Egypt would be, in this respect, in the same position as any other country.

(*e*) *The transitional régime: maintenance of Mixed Courts exercising, in addition to their previous jurisdiction, that of the consular courts*

7. Article 3 of the convention reads:

> "The Mixed Court of Appeal and the Mixed Tribunals now existing shall be maintained until the 14th October, 1949.

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[1] There are two important speeches in the minutes on this question of non-discrimination by Captain Wallace and Makram Pasha (pp. 87–90 of the minutes) which throw further light on these provisions.

> "As from the 15th October, 1937, they shall be governed by an Egyptian law establishing the Règlement d'organisation judiciaire, the text of which is annexed to the present Convention.
>
> "On the date mentioned in paragraph 1 above, all cases pending before the Mixed Tribunals shall be remitted, at the stage which they have then reached and without involving the parties in the payment of any fees, to the National Tribunals to be continued therein until they are finally disposed of.
>
> "The period from the 15th October, 1937, to the 14th October, 1949, shall be known as 'the transition period'."

and Article 15, after providing for ratification, says:

> "The present Convention shall come into force on the 15th October, 1937, if three instruments of ratification have been deposited. It shall not, however, come into force in respect of the other signatories before the date of the deposit of their respective instruments of ratification."

This article fixes the lifetime of the Mixed Courts and the length of the transitional régime. The "reasonable but not unduly prolonged period" of the Treaty of Alliance is fixed by the Montreux Conference at twelve years. The new "R.O.J." determines (*inter alia*) the new jurisdiction of the Mixed Tribunals; it includes (subject to possible reservation of personal status jurisdiction—as to which see paragraph 20 below) all the jurisdiction hitherto exercised by the consular courts and the previous jurisdiction of the Mixed Tribunals, but subject as regards the latter to certain modifications in the matter of "mixed interest" and the classes of persons henceforth to be regarded as "foreigners" for Mixed Court purposes. The R.O.J. also contains the conclusions reached on the Egyptian proposals for the decrease of foreign and the increase of Egyptian judicial personnel, &c. All this, however, is considered below in paragraphs 11–26.

Practical necessity required that an exact date should be fixed for the introduction of the new régime and that this date should coincide with the beginning of a judicial year. New judges had to be appointed, and a new R.O.J. and new codes put into force. Further, the Egyptian Government needed an exact date for budgetary purposes, since, foreigners being henceforth subject to Egyptian taxation, new kinds of taxes were likely to be introduced. The immunity of foreigners from taxation had hitherto led Egyptian revenue to be raised almost entirely by indirect taxation, such as customs duties. Moreover, if the date of the entry into force of the régime were fixed for the October following the receipt of all ratifications, the period of the transitional régime, fixed at twelve years on the understanding that it would commence immediately, might in effect be indefinitely delayed, or alternatively, if its termination were alone fixed at a certain date, the transitional period might be abbreviated because it began late, and thereby all calculations would be upset. On the other hand, there was a technical difficulty; for constitutional reasons affecting many of the parties the convention could only be signed subject to ratification, and the same constitutional reasons (the necessity of parliamentary procedure, &c.) made it impossible for many of the parties formally to engage themselves to ratify before a fixed date. As a practical compromise, it was therefore agreed in Article 3 that the transitional régime should begin in the following October, and Article 15 (3) provided that, if three instruments of ratification had been deposited by then, the convention should be regarded as having come into force and the new régime might then be put into operation as a whole. Though the convention was not formally binding on those who had not ratified by that date, their ratification when received would retrospectively ratify this arrangement and consequently in the interval between October and the deposit of their ratification they could not object to the application of the new régime[1] to their nationals, at any rate, unless they had finally decided never to ratify, in which case any rights the Egyptian Government might have unilaterally to denounce their capitulatory treaties would be exercisable.[2]

8. Article 4 provides for the retention in office of the existing judges, officials, and staff[3] of the Mixed Tribunals and Mixed Parquet.[4]

Article 8 provides:

> "Subject to the provisions of Article 9, no civil or commercial action, no action in matters of personal status, and no criminal cause shall be instituted before any Consular Court in Egypt after the 15th October, 1937.
>
> "Proceedings already brought prior to the above date in any such courts

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[1] The United States delegation in fact put in a special note consenting to the application of the new régime although the United States ratification had not been received in time.

[2] By Oct. 15, 1937, ratifications had been deposited in respect of Egypt, the United Kingdom, Belgium, Greece, Italy, Sweden, and Denmark. The new régime was duly instituted without objection at that date. Ratifications have since been deposited in respect of the Netherlands, New Zealand, Australia, Norway, India, and the Union of South Africa.

[3] It will be seen in paragraph 11 below, however, that additional judges and officials (foreign and Egyptian) have to be appointed on account of the increased jurisdiction under the new régime. See also paragraph 26 below with regard to the salaries, &c., of the judges and officials under the new régime.

[4] Articles 5 to 7 inclusive can best be considered later in connexion with the new R.O.J.

shall be continued before them until finally disposed of, unless they are remitted to the Mixed Tribunals under the conditions specified in Article 53 of the Règlement d'organisation judiciaire."

Article 53 of the R.O.J. provides as regards the remission of unfinished cases to the Mixed Courts that (1) in civil cases the remission will take place if all interested parties agreed to the cases remitted being continued by the Mixed Courts as from the stage they have then reached; (2) in criminal cases the consular court may remit.

Article 54 provides for the recognition by reinforcement by the Mixed Courts of consular orders and judgments, and Article 55 provides that the Mixed Courts will recognize the rules of limitation and prescription applicable in matters within the competence of the consular courts.

Articles 9 and 10 deal with the reservation of consular jurisdiction in matters of personal status and are most conveniently dealt with after the R.O.J.

(*f*) *Position of Consuls during the Transitional Period*

9. Article 11 provides:

"Without prejudice to the exceptions recognized by international law, foreign consuls shall be subject to the jurisdiction of the Mixed Tribunals. In particular, they may not be prosecuted in respect of acts performed by them in the performance of their official duties.

"Subject to reciprocity, they shall exercise the powers customarily granted to consuls as regards registration in matters of personal status, as regards contracts of marriage and other notarial acts, inheritance, the representation before the courts of the interests of their absent nationals and maritime navigation, and shall enjoy personal immunity.

"Until Consular Conventions are concluded, and in any case during a period of three years as from the date of the signature of the present Convention, consuls shall continue to enjoy the immunities which they possess at present in respect of consular premises and in the matter of taxes, customs duties, and other public dues."

(*g*) *Miscellaneous provisions of the convention*

10. Article 12 provides:

"The High Contracting Parties undertake to maintain in Egypt, during the transition period, all the judicial records of their Consular Courts.

"These records shall be open for inspection by the courts in Egypt whenever such inspection is required in connexion with a case coming within their jurisdiction: certified copies of such records shall be furnished upon the request of any such court."

Article 13 provides for the submission to the Permanent Court of International Justice of disputes relating to the interpretation or application of the convention; and Article 14 provides that the English and French texts are equally authentic, except as regards the R.O.J. where the French text is alone authentic.

R.O.J. (Annex to the convention)

(*h*) *The composition of the Mixed Courts in the future*

11. Article 1 maintains the Mixed Court of Appeal at Alexandria and three tribunals of first instance at Cairo, Alexandria, and Mansourah.

Article 2 provides that the Court of Appeal shall consist of eighteen appeal judges, of which eleven shall be foreign (these are the present numbers): that if necessary two further appeal judges may be added to the number, of whom one shall be foreign:[1] that vacancies occurring in the number of foreign appeal judges shall be filled by the promotion of foreign judges from the tribunals of first instance.[2]

The effect of this article is to preserve the existing composition of the Court of Appeal with its foreign majority throughout the transitional period. This is a very important safeguard from the foreign point of view, seeing that the Court of Appeal is not merely the supreme tribunal for the decision of cases but also exercises independently control over the whole Mixed Court organization. This control includes the allocation and distribution of judges to different tribunals and amongst chambers of three within the tribunals, including their allocation for criminal and civil work respectively; the choice of Presidents and Vice-Presidents of Tribunals and Presidents of chambers; and the discipline of the judges; the discipline and control over the officials of the Mixed Courts; and the Statutes and discipline of the Mixed Bar. Much of this control is exercised through regulations (called the Règlement Général Judiciaire) drawn up by the Court of Appeal and promulgated by Egyptian Government decree. All this control is retained in the R.O.J. (Articles 7, 10, 13, 14, and 57).

Article 3 provides that the tribunals of first instance shall be composed of sixty-one judges: that on October 15, 1937, forty of these shall be foreign: and as vacancies occur amongst the foreign judges by reason of retirement, death, dismissal or promotion, these vacancies shall be filled by Egyptian judges, provided, however, that the number of foreign judges shall never fall below one-third of the total number. It should be noted:

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[1] Two extra appeal judges were added at the beginning of October, 1937.

[2] It is recorded in the report of the Drafting Committee that "the Egyptian Government will as far as possible continue the practice now followed in regard to replacing a foreign judge of the appeal court of a given nationality by a judge of the same nationality". The Court of Appeal have, however, also to approve of the promotion of a judge (last paragraph of Article 6 of the R.O.J.). The filling of foreign vacancies in the Court of Appeal by promotion of course increases the foreign vacancies in the tribunals of first instance to be filled in future by Egyptian judges.

(i) There is here an increase of six in the total number of judges—to provide for the increased work resulting from the transfer of criminal jurisdiction. There will probably not be much increase from the transfer of the personal status jurisdiction owing to the use made of the right to retain consular courts for this (see paragraph 20 below), and the small increase of other civil work resulting from the inclusion of cases between two foreigners of the same nationality will probably be offset by a decrease resulting from the curtailment of "mixed interest" (see paragraph 22 below) and the reduction of the classes of persons who are "Mixed Court foreigners" (see paragraph 14 below).

(ii) The six new additional judges required to fill up the numbers are three Egyptian and three foreign, and the transitional period is thus begun with the existing two to one foreign majority.

(iii) This foreign majority will gradually sink till it becomes a minority with a minimum of one-third.

Article 4 provides that the president of the Court of Appeal shall be foreign[1] and the vice-president Egyptian. Apart from this there shall be no distinction by nationality as regards the eligibility of any judge to fulfil any judicial function, including the presidency of tribunals and chambers. If the president of a tribunal is Egyptian, the vice-president shall be foreign and vice versa. Satisfaction is thus given to the Egyptian desire to increase the number of Egyptian judges and to secure for them the prestige and experience of presiding.[2]

Article 5 provides:

(1) that the Court of Appeal in civil cases shall sit in chambers of five judges, except in hearing appeals from a judge of

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[1] Sir Richard Vaux, the last President under the old régime, happily remains to introduce the new régime of the Mixed Courts. There are two other British judges on the Court of Appeal, Mr. Murray Graham and Mr. Blake-Reid.

[2] The old R.O.J. provided that chambers should always be composed of two foreign and one native judge (or three foreign and two native in the Court of Appeal). The new R.O.J. contains no provision of this kind—indeed, in view of the changing proportions in the tribunals of first instance, it would have been difficult to draft any suitable clause. The allocation is therefore left to the unfettered discretion of the Court of Appeal to make the best use of its judicial personnel.

first instance sitting alone, when the "law" may provide for chambers of three;

(2) that *cour d'assises*—the supreme tribunal for criminal matters—should be composed of five judges, including three appeal court judges;

(3) that tribunals of first instance should sit in chambers of three for civil and criminal work and the "law" may provide for two assessors in addition for commercial work, who may advise but take no part in the decision;

(4) interlocutory work in chambers, summary cases, and police offences may be dealt with by a single judge.

Article 6 provides for the nomination of judges by Egyptian decree, and paragraph 2 of the Protocol continues in effect a provision of the old R.O.J. which is not repeated in the new one—it says:

> "The selection of foreign judges is a matter for the Egyptian Government, but in order to satisfy itself regarding the suitability of the persons whom it may select, the Egyptian Government will approach unofficially the Ministers of Justice of the foreign countries concerned and will appoint only persons of whom their respective Governments approve."[1]

Articles 7–11 call for no further mention.

(*i*) *Judicial languages*

12. Article 12 reads:

> "The judicial languages employed in the Mixed Tribunals for the conduct of cases and for the drafting of official documents and judgments shall be: Arabic, English, French, and Italian.
>
> "The operative part of judgments shall be pronounced in two of the judicial languages, of which one must be Arabic. After the pronouncement, judgments drawn up in a foreign language shall be translated in their entirety into Arabic and those drawn up in Arabic shall be translated in their entirety into a foreign language.
>
> "In the event of divergence between the original text and the translation, the former shall be authentic."

The text settles in a most satisfactory way the language difficulty. The first paragraph is the same as in the old R.O.J. In fact, all the work of the Mixed Courts has been done in French and a large proportion of the judges and bar are unable to conduct their work in any other of the four languages mentioned. But it was felt by

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[1] It also fixes retiring ages of the judges, 65 (first instance), 70 (Court of Appeal); in view of the replacement of retiring foreign judges by Egyptian judges, this point becomes important. As the Drafting Committee report states, the Egyptian Government may retain a judge after retiring age if it wishes, but may not retire a judge against his will before that age.

Egypt—with some justice—that more respect should be paid to Arabic, the language of the country, and in particular that judgments, which form a part of the national jurisprudence, and may be of interest in the native courts since both Mixed and native courts apply to some extent the same codes, should be in Arabic.

(*j*) *The Parquet*

13. We now come to the Parquet, a department which under the new régime is entrusted with functions more extensive and more important than previously. Article 16 provides that the Mixed Parquet will exercise the functions entrusted to it by the R.O.J.—which are in fact rather extensive—and any others conferred on it by other laws, and shall be under the direction of a foreign procurator-general.[1]

Article 17 then provides:

> "The Procurator-General shall be assisted by a First Advocate-General of Egyptian nationality and by a Second Advocate-General of foreign nationality.[2]
>
> "Should the Procurator-General be absent or otherwise prevented from discharging his duties, he shall be replaced in civil matters and for the purposes of administration by the First Advocate-General, and in criminal matters by the Second Advocate-General.
>
> "The Procurator-General shall, in addition, have under his direction an adequate number of deputies."

The importance of the Parquet and consequently of the agreement that the post of Procurator-General (as well as that of second Advocate-General) shall be held throughout the transitional régime by foreign officers, will be appreciated when the nature of its functions is enumerated. These comprise:

(1) the duties of Director of Public Prosecutions and his counsel (Articles 20 and 48);

(2) the responsibility for the issue of warrants of arrest or domiciliary search against a foreigner (Articles 47 and 20);

(3) every detention of a foreigner by the police must be notified to the Parquet whose duty it is either to order his release or to bring him before the *juge d'instruction* within four days. The

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[1] The Procurator-General ranks as an appeal court judge for purposes of precedence. From the practical point of view, under the new régime he comes second in importance only to the President of the Court of Appeal. Mr. Holmes, who has previously held this office, retains it under the new régime. In many respects the Procurator-General is the key post of the new régime.

[2] The two posts of Advocate-General are new in view of the increased work. Mr. Payne, formerly a British inspector of the native courts Parquet, has now become second Advocate-General of the Mixed Courts.

Parquet receives requests from a foreigner detained pending trial to see his consul or his lawyer, and is responsible for granting permission to the consul and lawyer to visit him in prison;

(4) the right to be present and address the court in any case where the Procurator-General considers an important question of general principle is involved (Article 19);

(5) the duty of giving advice to the Government as regards the remission of any punishment in whole or in part of a convicted person and as regards the execution or commuting of a capital sentence (Article 21);

(6) the right of inspection of prisons and places of detention and any place where foreigners are confined, and the duty of reporting irregularities to the Ministry of Justice (i.e. harsh or improper treatment: detention prolonged beyond legal sentence or not justified by any sentence, &c.);

(7) the duty to assist the court as regards any question of personal status or nationality. The right to intervene in any question affecting minors or incapables and to take steps for their protection or that of their property (Article 23);

(8) the supervision of judicial funds, &c., and of the clerks of the courts and the process servers, although the latter are under the administration of the Presidents of Tribunals (Article 24);

(9) (as shown by the Drafting Committee's report on Articles 27–32 of the R.O.J. and the documents referred to therein) the right to intervene if a person is confined wrongfully as a lunatic: further, it is proposed to enact a new law placing all establishments for the detention of lunatics under the supervision of a council on which the Procurator-General will sit.[1]

(10) All the staff of the Parquet, including the "judicial police", are responsible up the hierarchy to the Procurator-General, and the latter to the Ministry of Justice (Article 18). The Report of the Drafting Committee on this article refers to an Egyptian declaration in the minutes (p. 171) stating that the Egyptian Government will continue to observe the practice by which promotions of members of the Parquet and changes in their functions will be in accordance with the suggestions made by the Procurator-General to the Minister. In effect, therefore, the Procurator-General has the same independent control over his Department as the Mixed Court of Appeal has over the judges and the staff of the Mixed Court.

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[1] See also paragraph 26 below: the Procurator-General has also a role to play in connexion with the deportation of foreigners.

(*k*) *The Definition of "Foreigner" for the purposes of Mixed Court Jurisdiction*

14. Article 15 defines the word "foreigners" for the purposes of Mixed Court jurisdiction. Under the old régime the jurisprudence of the Mixed Courts had defined foreigners for this purpose as all non-Egyptians except Ottoman nationals or persons belonging to territories which formed part of the old Ottoman Empire: thus including not merely all nationals (*ressortissants*) of the capitulatory powers,[1] but also the nationals of non-capitulatory powers who were subject to the native courts in penal matters or matters of personal status, &c. Further, "nationals" includes juridical persons, i.e. companies created under the law of the country in question. The Egyptian Government wished to reduce the classes of Mixed Court foreigners, firstly by cutting out the nationals of non-capitulatory powers; (they were willing, however, to retain nationals of those powers which had formerly possessed capitulatory rights, except Soviet Russia with whom they are not in diplomatic relations, and of those new states which were composed, wholly or in a great measure, of territories which had previously been part of former capitulatory powers[2]); secondly, by cutting out "colonial nationals". The first of these proposals was in effect accepted. Paragraph 1 of Article 25 states that "For the purpose of the jurisdiction of the Mixed Courts, the word 'foreigner' includes the nationals of the High Contracting Parties to the Montreux Convention[3] and the

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[1] i.e. not merely their citizens but also their colonial nationals or protected persons, viz. in the case of the British Empire not merely all British subjects from wherever originating, but also all British protected persons, the natives of protectorates, &c., and in the case of France not merely French citizens but French *sujets* and *protégés*; the natives of British and French mandated territories formerly part of the Ottoman Empire, although British and French nationals, were, however, not included.

[2] Some of these, viz. Germany, Austria, and Roumania, could claim this on the basis of treaties of a m.f.n. character.

[3] Viz. all the capitulatory powers: U.S.A., Belgium, His Majesty the King in respect of Great Britain and Northern Ireland, Australia, New Zealand, South Africa, the I.F.S. and India (Canada had acceded in advance); Denmark, Spain, France, Greece, Italy, Norway, Netherlands, Portugal, and Sweden.

It is perhaps interesting to note (1) that Spain was represented by plenipotentiaries of the Valencia Government, without apparent objection on the part of Italy which recognizes General Franco's Government as the Government of Spain: (2) that in the preamble the King of Italy is also described as "Emperor of Ethiopia" and that apparently delegations of countries which had not recognized Italian sovereignty over this country did not consider this prejudiced their position. There are statements by the President of the General Committee on pp. 129 and 137 of the minutes to the effect that each delegation is alone responsible for the description of its "Head of State" in the preamble.

nationals of any other state which may be added by Egyptian decree". Paragraph 1 of the Egyptian declaration then explains that Egypt has decided to add by decree the following eight states: Austria, Czechoslovakia, Germany, Hungary, Poland, Roumania, Switzerland,[1] and Yugoslavia. Egypt remains free to add to the list if she wishes, and the other parties to the convention are not responsible for excluding any classes of foreigners.[2] The next two paragraphs of Article 25 provide that no Egyptian national can become a "foreigner" by having foreign protection extended to him, and that the natives of Syria and the Lebanon or of Palestine or Transjordan are not "foreigners".

15. There were insuperable difficulties in the way of accepting the second Egyptian proposal, although it was pressed very hard on the ground that the majority of these "colonial nationals" in Egypt were by race, religion, and habits so close to the population of Egypt. However, a curious and rather complicated compromise was reached which is embodied in the fourth paragraph of Article 25. In order to explain this paragraph, it is necessary to set out here some explanation which would otherwise have been more properly placed below in the discussion of the question of personal status.

In Egypt, matters of personal status are not dealt with by the ordinary civil courts at all, but by religious courts. There are Sharia courts for Mohammedans, Coptic church courts, courts for the different sections of orthodox Christians, Roman Catholic courts, &c.;[3] Egyptian nationals and non-capitulatory foreigners have recourse to the courts of the religion to which they belong. In the case of capitulatory foreigners the position was more complicated. In principle they were all, in matters relating to personal status, subject to the jurisdiction of their consular courts, but the consular courts acting under their national legislation permitted certain classes of their nationals to have recourse in such matters to the native religious courts in Egypt. This was regarded as a sort of delegation from the consular court and the judgment of the native religious court would, if it had to be enforced, require to be recognized by the consular court. In practice the consular courts permitted this recourse to religious courts in the case of those classes of their colonial nationals who by religion or race were most close to the natives of Egypt. In the British consular court this was permitted in the case of British subjects and British protected persons who were Moslems, but not in other cases.[1] The fourth paragraph of Article 25 of the R.O.J. provides that foreign nationals, whether citizens, subjects, or protected persons, belonging to religions for which there exist Egyptian *statut personnel* tribunals shall continue *in the same conditions as in the past* to be subject in respect of *statut personnel* matters to these Egyptian tribunals; that is to say, where capitulatory nationals have been permitted by their consular courts to have recourse to Egyptian religious tribunals in matters of personal status in the past they are to remain subject to these tribunals in respect of such matters.[2] The test is what the position in the past was in this respect, and not merely whether they belong to religions for which there are religious tribunals in Egypt. The result of this paragraph is that these classes of persons are in respect of matters of personal status excepted from the jurisdiction of the Mixed Courts and also from consular jurisdiction if that be reserved. They remain, however, foreigners for the purposes of Mixed Court jurisdiction, but even here, in the fifth paragraph of Article 25, a further distinction is made between these people and other Mixed Court foreigners. The nature, however, of this distinction can only be clearly appreciated after the provisions of the next article have been considered.

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[1] Switzerland was in a special category: never a capitulatory power, her citizens had been allowed to acquire capitulatory status by registration at consulates of capitulatory powers.

[2] A Drafting Committee note also explains that it is understood that Egypt can also, if she wishes, add stateless persons, such as White Russian refugees.

[3] There are no religious courts of protestant Christian communities, Buddhists, &c.

(*l*) *Jurisdiction of the Mixed Courts in civil and commercial matters*

16. Article 26 of the R.O.J. provides (1) that the Mixed Courts shall entertain all civil and commercial actions between "foreigners" or between "foreigners" and persons subject to the

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[1] The Egypt Order in Council 1930 provided that "In all matters relating to marriage, dissolution of marriage, inheritance, wills, gifts, family relations and other matters involving religious law and custom the court shall . . . in the case of a person belonging to a non-Christian community other than the Jewish community, recognize and apply the religious law or custom of the community to which such person belongs if such person is domiciled in Egypt or in some other country where the religious law and custom of his community would in such matters be applied to him". In the case of Christians and Jews, the British consular court decided the case in the ordinary way in accordance with the principles of English law. In the case of Moslems, the court allowed the religious law and custom to be ascertained by a judgment of the native Sharia court which it then recognized. In the case of other non-Christian British nationals there were no religious courts in Egypt to which they could go; so the consular court had to ascertain the relevant religious law itself.

[2] A Drafting Committee note, however, explains that in future this is not to be by way of "delegation" from the consular or Mixed Courts: the judgments of these religious courts, in cases where foreigners lawfully resort to them, will in future not require any recognition by any other court to be enforceable.

jurisdiction of the native courts; (2) that any foreigner may voluntarily submit to the jurisdiction of the native courts (*a*) by entering into a contract with a clause by which disputes under it are to be decided by these courts;[1] (*b*) by appearing as plaintiff; (*c*) by appearing if sued there and not objecting to the jurisdiction before the delivery of the judgment.[2]

Paragraph 5 of Article 25 (referred to in paragraph 15 above) provided a further special rule as regards the classes of foreigners who, in personal status matters, are subject to the Egyptian religious tribunals. In civil and commercial matters only they have the right to opt as between the Mixed and native courts and, if they are sued in the native courts in a case where they have not previously accepted that jurisdiction by contract, they must, if they wish to opt for the Mixed Courts, take the positive step of objecting to the jurisdiction of the native courts either in writing addressed to the court or by an oral objection taken at the first hearing.[3]

(*m*) *Personal status*

17. We now come to the question of "personal status", which is complicated. The new provisions should, however, eliminate a large proportion of the conflict and confusion which prevailed as regards jurisdiction in this sphere under the old régime. Previously, in theory, the Mixed Courts had no jurisdiction whatever in "personal status" cases, which all came before either the Egyptian religious courts or some consular court. As, however, the consular courts could only enforce their jurisdiction over their own nationals, and as a *statut personnel* suit may involve persons of different nationality (viz. a claim for maintenance in respect of an illegitimate child, the mother and child having nationality *X* and the putative father nationality *Y*; a divorce suit between husband and wife now possessing different nationalities, and having changed their nationalities since their marriage, &c.), there were many cases where two or more courts claimed jurisdiction and where no one court could bring before it, and enforce

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[1] Under paragraph 6 of the declaration, the Egyptian Government state that such clauses will not be inserted in contracts concluded by the government or any public administration or municipality.

[2] This is a change: previously the Mixed Courts had regarded their jurisdiction as a matter of *ordre public* and individuals could not modify it by voluntarily submitting to another jurisdiction.

[3] It may be feared that this provision will, in practice, cause some litigation and difficulty: it may not be obvious to a creditor whether his foreign debtor is subject in respect of personal status to the Egyptian religious courts or not.

its decision on, all the interested parties. This confusion and conflict was increased by the fact that many persons possess two nationalities. In fact, the Mixed Courts were obliged in certain cases to entertain some applications in what were strictly personal status matters because otherwise a complete deadlock would be reached and much injustice done.

18. There were three main principles which were accepted at the Montreux Conference and which had to be worked out in such a way as to result in there being one jurisdiction, and only one, competent to deal with each case; these were (1) that the Mixed Courts should have jurisdiction in foreign personal status suits; but what precisely does personal status cover, and how are foreign cases to be distinguished from Egyptian cases? (2) that the powers now possessing consular courts in Egypt might retain them for part or the whole of the transitional period, and there deal with personal status cases of their nationality; but how precisely are cases which should come before a French consular court to be distinguished from those which should come before a British consular court? (3) that the Mixed Courts should apply to personal status cases the national law of the parties; but which national law, when the interested parties might be of different nationalities or of double nationality?

19. The provisions drawn up at the conference begin by defining what personal status consists of (Article 28 of the R.O.J.). They then give rules which determine, with reference to the different classes of personal status suits, whether a suit is to be deemed to be an Egyptian suit or a French suit, &c., selecting in each case the nationality of a certain individual at a certain time to determine this; for instance, questions of paternity and legitimation depend upon the nationality of the putative father. Where the Mixed Courts deal with the case, they will apply the national law of this person to determine the case (Article 29 of the R.O.J.). There is another provision excluding the *renvoi* (Article 31 of the R.O.J.). It is then provided that the Mixed Courts shall have jurisdiction in personal status cases where, in accordance with the rules mentioned above, the law to be applied is a foreign law (Article 27 of the R.O.J.).[1] Further, it is provided that the Mixed Courts, in cases which they deal with, may (by way of exception

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[1] It must be remembered, however, that, as the result of Article 25, the laws of Palestine, Transjordan, Syria, and the Lebanon are not foreign laws for this purpose and, further, that certain classes of foreign nationals are subject in personal status cases to the Egyptian religious courts.

to the ordinary rule that procedure is always governed by the *lex fori*) apply in personal status cases not merely the foreign substantive law, but also the foreign procedural law in so far as the latter is not inconsistent with relevant Egyptian rules and procedure (Article 32 of the R.O.J.). The reason for this rather obscure provision is that, whereas in other cases, criminal and civil, the Mixed Courts were furnished with procedural codes, there is no code of procedure to guide them in dealing with personal status cases, and, moreover, in these cases it is often difficult to distinguish rules of procedure from those of substance. Then a further provision lays down, by way of exception to Article 27, that the Mixed Courts will not be competent in matters of personal status in cases where the national law, which, under the rules of Article 29, determines the nationality of the suit, is that of a High Contracting Party to the convention who, in accordance with Article 9 of the convention, has retained a consular court for personal status cases and has not withdrawn this reservation.

20. Articles 9 and 10 of the convention give the right to powers at present possessing consular courts in Egypt to retain such courts for the purposes of jurisdiction in matters of personal status (as defined by Article 28 of the R.O.J.) in all cases in which (according to Articles 29 and 30 of the R.O.J.) the law applicable would be the national law of that High Contracting Party. The law applicable to the suit in accordance with these rules determines what cases come before a consular court, but of course the consular court is free, in a case which comes within its jurisdiction under these rules, to apply such law to determine the case as may be prescribed by its own national authority.[1] Further, it is important to notice that, the jurisdiction of the consular courts being recognized as extending to certain suits by a general instrument governing the Mixed Courts and accepted by Egypt and the other powers, the result is that, if a suit comes within the jurisdiction of a consular court all parties interested in the suit do so likewise, whatever their nationality, and the judgment is enforceable against them, if necessary, by the Mixed Courts under Article 54 of the R.O.J., which provides that the judgments and orders of the consular courts will maintain the force of *res judicata* and will be executed where necessary by the Mixed Courts.[2] The unsatis-

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[1] Drafting Committee Report on Article 10 of the convention.

[2] Article 38 (3) of the Egypt Order in Council, 1937, provides for requests by the British consular court to the Mixed Court for enforcement of its orders in personal status cases.

factory position described at the beginning of this article should not continue in the transitional régime. (It must be recalled here that these articles of the convention provide for a reservation of jurisdiction which would otherwise go before the Mixed Courts and which, consequently, does not include foreign personal status cases which, as the result of the provisions of Article 25 of the R.O.J., go to the Egyptian religious courts (see paragraph 15 above)). If a High Contracting Party wishes to reserve consular jurisdiction for this purpose, notification must be given at the time of the deposit of the instrument of ratification, and such consular jurisdiction may be renounced and transferred to the Mixed Courts by notification given at any time during the transitional régime and the transfer will take effect from the 15th October next following the notification. At the end of the transitional régime the consular courts retained for personal status cases are to be closed, and proceedings which are pending are to be transferred at the stage which they have then reached to the Egyptian national courts.[1]

21. There is, further, in paragraph 3 of the declaration an undertaking by the Egyptian Government to adopt indefinitely after the end of the transitional régime the principle of the application of the foreign national law in personal status cases. This Declaration does not, of course (nor could it be expected to), commit the Egyptian Government to adopt indefinitely the rules laid down in Articles 29 and 30 of the R.O.J. for the determination of the national law. It is clear from Article 9 of the Declaration that, at the end of the transitional régime, foreign personal status cases will go before the Egyptian civil courts and not the religious courts.[2] This will mean that before the end of the transitional régime a personal status code will have to be enacted by the Egyptian Government to enable the native civil courts to deal with foreign personal status cases. This code will be based on the principle of the application of the foreign national law, and the declaration also provides that the rules of procedure provided in the code will not operate so as to prevent effect being given to a

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[1] At the time of writing, notifications reserving consular jurisdiction in personal status have accompanied every ratification deposited up to date, except that of His Majesty in respect of the Union of South Africa. In addition, Germany, Austria, and Roumania, being able to claim most-favoured-nation rights, also claimed the right to retain consular courts for personal status cases, and the Egyptian Government recognised this right. See paragraph 28 *et seqq.* below as regards the British Consular Court in Egypt in the future.

[2] See Drafting Committee report on Article 9 of the convention.

substantive provision of the foreign national law. There is also in the Drafting Committee report on this declaration a sentence in somewhat vague terms which seems to indicate that in enacting this code the Egyptian Government will not adopt the principle of *renvoi*.[1] It need hardly be explained that the exclusion of the principle of *renvoi* is of some importance if it is desired that the personal status cases of British subjects domiciled in Egypt should be determined in accordance with their national law.

The texts of Articles 27 to 32 and of Article 56 of the R.O.J., and of Articles 9 and 10 of the convention, together with paragraph 3 of the Egyptian declaration, which are of some general interest, are given in Annex II to this article.

(*n*) *Mixed interest*

22. The very important but technical and difficult question of the jurisdiction of the Mixed Courts under the principle of "*mixed interest*" is dealt with in Articles 33–37 and 40–42 of the R.O.J. and completed by Articles 5 and 7 of the convention. Some explanation of the problems facing the Conference under this heading has been given in paragraph 3 above.

Article 33 of the new R.O.J. begins by abolishing the principle of mixed interest altogether, but is expressly made subject to later articles. Article 34 then provides that Egyptian companies *already formed*, in which there is a substantial foreign interest, shall be regarded as "foreigners" for jurisdictional purposes unless there is a clause providing for the contrary in their statutes.[2]

Article 35 provides for Mixed Court jurisdiction in all bankruptcy cases where any foreign creditor makes a claim.[3]

Article 36 provides that if there is a "hypothec" in favour of a foreigner on real property, by whomsoever possessed or owned, the Mixed Courts shall be competent to pronounce upon the validity of the charge and on all consequences thereof, including the judicial sale of the property and the distribution of the proceeds.

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[1] "In regard to the text of this declaration, the Egyptian delegation explained that it was understood that the general tendency of private international law is oriented towards the suppression of the *renvoi* to another national law."

[2] The Drafting Committee's report says "'substantial' here means neither trivial nor fictitious. The position of companies in which there is a substantial 'Mixed Court foreigner' interest, formed under the law of a country, such as Turkey, whose nationals are not Mixed Court foreigners, has been overlooked: but presumably the same rule must be applied to them as to Egyptian companies".

[3] The Drafting Committee's report explains that, in the case where the bankrupt is an Egyptian, the transfer to the Mixed Courts will take place on the day when the first foreign creditor enters an appearance.

Article 37 deals with the difficult question of accessory (third party) actions. The Egyptian Government were unwilling to agree to the maintenance of the position under which the Mixed Courts decided any case which was accessory to a case within their ordinary jurisdiction, or which was the principal action to which an action between parties subject to their ordinary jurisdiction was accessory. They proposed in their letter to the other powers[1] that both the Mixed and native courts should be able to entertain actions between any parties which were accessory to an action within their competence. The minutes show that this proposal did not meet with the approval of the Conference, who feared it would lead to constant conflicts of jurisdiction and to fictitious principal actions. The solution, therefore, adopted in Article 37 of the R.O.J. and Article 5 of the convention, was to prohibit both the Mixed and native courts from entertaining actions not within their ordinary competence on the ground that they were accessory to an action which was so, unless the accessory action was remitted to them by the other jurisdiction, and that this latter should be the judge of whether this course was desirable in the interests of justice.

Article 40 lays down that assignments of rights of action, the citing of fictitious parties, &c., carried out simply for the purpose of removing a case from the national courts, shall not be accepted for the purpose of conferring jurisdiction on the Mixed Courts. There are special provisions about bills of exchange.

Article 41 provides that when a party to proceedings, whose foreign character was the foundation of the competence of the Mixed Court jurisdiction to entertain an action, ceases to be a party during the proceedings, the suit shall be transferred '*en l'état*'' to the native courts if a party to the proceedings makes an application to this effect.

Article 42 of the R.O.J. and Article 7 of the convention provide that a change in the nationality of a party during the proceedings shall not affect the jurisdiction of a court which possessed jurisdiction in the first place.

Articles 37 and 41 make changes. Article 40 does not depart widely from previous Mixed Court jurisprudence. Articles 34, 35, and 36 confirm the pre-existing position based on Mixed Court jurisprudence as regards the most important aspects of mixed interest.

23. As a result of the changes as regards the definition of

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[1] See paragraph 3 above.

"foreigners" and "mixed interest", a certain number of cases formerly within the jurisdiction of the Mixed Courts will come in future within the competence of the Egyptian Native Courts. Paragraph 2 of Article 53 of the R.O.J. provides, however, that even in these cases the Mixed Courts shall finish any cases which they may have begun.

(*o*) *The right to sue the Government*

24. While it was agreed to abolish the restrictions on the liberty of the Egyptian Government to apply Egyptian legislation to foreigners and consequently the legislative powers of the Mixed Courts (the power to decide whether a given law could validly be applied to foreigners automatically disappears as the result of these changes), it was also desired to remove from the Mixed Courts the competence to consider whether a given Egyptian law was or was not consistent with Egyptian treaty obligations (including the provisions of this convention as regards non-discrimination) and to award damages to an individual injured as a result of legislative or administrative action, which, though consistent with the Egyptian law and constitution, violated a treaty. It was thought best that the question whether an Egyptian law violated a treaty obligation should be dealt with exclusively by the governments through the diplomatic channel, and decided, if necessary, by an international court in a dispute between the governments. On the other hand, it was desired to retain intact the very complete right which individuals had, since 1875, enjoyed in Egypt of suing the Government for any injury done as the result of administrative action which was not justified by the law. Article 43 of the R.O.J. is the result.[1]

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[1] The text reads:

"The Mixed Tribunals may not directly or indirectly pass judgment on acts of sovereignty. They may not give decisions on the validity of the application of Egyptian laws or regulations to foreigners.

"Furthermore, they may not give decisions on the ownership of public property.

"Nevertheless, though they may not interpret an administrative act or arrest the execution thereof, they shall be competent to hear (1) all civil and commercial actions between foreigners and the state concerning movable or immovable property; (2) civil actions brought by foreigners against the state in respect of administrative measures taken in violation of laws or regulations."

The Report of the Drafting Committee says:

"This article was retained in the form adopted by the Committee, in the light of the observations made at the plenary meeting from which it appears:

"(1) that the expression 'laws and regulations' should be understood as covering also provisions of treaties of such a nature that they had to be transformed by the Egyptian Government into a text of municipal law;

(*p*) *Criminal matters*

25. Articles 44–50 deal with criminal matters, but Articles 47, 48, and 49 have already been referred to in connexion with the parquet.

Article 44 provides that the Mixed Courts shall entertain any prosecution of a foreigner for a breach of the law.

Article 45 of the R.O.J. and Article 6 of the Convention provide that the Mixed and national courts respectively shall be competent to punish persons of any nationality who commit offences in their capacity of judges or officers of the court; or who commit offences against judges and the officers of the court during the proceedings, or against the execution of judgments or orders of the court (i.e. contempt of court); also to punish persons of any nationality who commit bankruptcy offences in bankruptcy cases dealt with by the court.[1]

This article involves an extension of the jurisdiction of the national courts since contempts of court by capitulatory foreigners against the national courts were previously dealt with by the consular courts.

The new penal and criminal procedure codes, which were produced at the Conference and which will be applied by the Mixed Courts, are conceived on enlightened (continental) lines.

(*q*) *Undertakings with regard to deportation, extradition, and the treatment of judges and officials of the Mixed Courts and the Mixed Bar*

26. Paragraphs 4, 5, and 7 of the Egyptian Declaration provide for safeguards for foreigners in certain matters not dealt with elsewhere. They read as follows:

> "4. *Deportation.* Although the abolition of Capitulations entails the removal of all the existing restrictions on the Royal Egyptian Government's right to deport foreigners who are within Egyptian territory, nevertheless that Government does not intend to exercise during the transition period its right of deportation in respect of a foreigner subject to the jurisdiction of the Mixed Tribunals,

> "(2) that the term 'violations' should be taken to mean not only violations of the letter but also violations of the spirit of the law.

> "It is further understood that the prohibition of decisions as to the validity of the application of Egyptian laws or regulations to foreigners entails, as a consequence, the prohibition of consideration whether Egyptian laws are inconsistent with the principles generally adopted in modern legislations or whether they discriminate against foreigners."

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[1] It is unlikely in practice that the native courts will deal with any bankruptcy case where any foreigner is involved (see paragraph 14 above: Article 35, R.O.J.).

who shall have resided in Egypt for at least five years, or to refuse such a foreigner access to Egyptian territory, if he has temporarily quitted that territory, unless:

(*a*) he has been convicted in respect of a crime or misdemeanour punishable by more than three months' imprisonment, or

(*b*) he has been guilty of activities of a subversive nature or to the prejudice of public order or public tranquillity, morality or health, or

(*c*) he is indigent and a burden upon the state.

The Royal Egyptian Government further proposes to set up an administrative advisory committee, of which the Procurator-General of the Mixed Tribunals shall be a member, for the purpose of examining any disputes on the subject of the identity or the nationality of the person whose deportation is under consideration, or of the length of his residence in Egypt, or of the existence of the facts which constitute the grounds for deportation.

5. *Extradition.* In conformity with the practice generally adopted in regard to extradition, the Royal Egyptian Government intends to adopt judicial procedure in this matter. It will therefore be necessary for the Mixed Tribunals to pronounce upon the regularity of the request for extradition when such request relates to a foreigner within the jurisdiction of the said Tribunals.

7. *Judges, Officials and Members of the Bar.* The Royal Egyptian Government does not intend to alter either the existing conditions of service or the present salaries of judges of the Mixed Tribunals.

Similarly, the Government does not intend to alter the present salaries of officials and employees of the said Tribunals.

It will give sympathetic consideration to their treatment in respect of grading, rules for increase of salary and promotion, when the new cadre now being considered is introduced.

The case of any such officials and employees who may be retired at the end of the transition period will receive special consideration, the circumstances peculiar to each individual being taken into account. Should such circumstances justify it, certain advantages may be granted in the matter of the pension or compensation to be paid.

As regards the pensions of foreign judges, officials and employees, the Government intends to ensure that they are not prejudiced by double taxation.

Furthermore, in the case of advocates admitted to practise at the Mixed Bar the Egyptian Government intends to take the necessary measures to enable such advocates, at the end of the transition period, to obtain unconditionally the inscription of their names and the recognition of their professional seniority on the roll of the Order of Advocates practising in the National Tribunals."

(*r*) *Foreign charitable, medical, and religious institutions in Egypt*

27. An important feature of the organization of foreigners in Egypt in separate national communities under the capitulations, referred to in paragraph 3 above, was the possession by these communities of their own schools, hospitals, churches, and charitable organizations for the relief of poverty. These institutions were created under, and administered in accordance with, the foreign national law of the different communities as corporate bodies, "fondations", trusts, &c. Judicially, they were subject to the

consular courts (some of them exclusively, being exempt even from Mixed Court jurisdiction in their relations with persons of another nationality by reason of reservations made when the capitulatory powers accepted the Mixed Courts). They possessed property real and movable and the benefits of their work were not confined entirely to members of the community since Egyptians attended their schools and were treated in their hospitals. It was necessary that some document should make their position clear in the future. The question, however, did not interest all the capitulatory powers equally. Only those with large communities in Egypt (the United Kingdom, France, Italy, and Greece) were vitally interested: the U.S.A., Spain, and the Netherlands had a small interest therein, and the other powers no interest at all. Consequently, the question was dealt with by notes in identical terms exchanged between the Egyptian delegation and each of the other interested delegations. Under these notes the Egyptian Government undertakes that, pending the conclusion of a subsequent agreement, or, in any case, until the end of the transitional period, all educational, medical, and charitable institutions, associations, or foundations of the countries in question actually existing in Egypt at the date of the convention may continue to carry on their activities subject to the following conditions:

"(1) They will be subject to the jurisdiction of the Mixed Courts and subject to Egyptian laws and regulations, including fiscal laws, under the same conditions as similar Egyptian institutions, and also to all measures necessary for the preservation of public order in Egypt.

"(2) They will retain their legal status and, as regards their organization and operation, will be governed by their own charters etc.[1] and by their own curricula.

"(3) They may, without prejudice to the laws relating to expropriation for purposes of public utility, possess the movable or immovable property necessary to enable them to attain their objects and may administer and dispose of their property for these purposes.

"(4) They may continue to employ their existing staff and may also employ either Egyptians or foreigners, without prejudice in all cases to the application of the Egyptian laws now applicable to them, or to the Egyptian Government's general right of control over the entry of foreigners into Egypt."

Furthermore, within the limits of the customs recognized in Egypt regarding religions other than the state religion, freedom of worship will continue to be assured to all religious institutions of the countries concerned on condition that there is no offence against public order or morals. A list of the institutions in question is to be drawn up as soon as possible in agreement between the Egyptian Government and the governments of the countries in question.

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[1] i.e. in the case of the English institutions, by their trust deeds, interpreted in accordance with the English law of trusts.

(s) *The British Consular Court in Egypt during the transitional régime: the Egypt Order in Council, 1937*

28. It has been explained in paragraph 20 above that under Article 9 of the convention any High Contracting Party who possessed in 1937 consular courts in Egypt might retain such courts for the purposes of jurisdiction in matters of personal status *in all cases in which the law applicable is the national law of the High Contracting Party concerned*, provided that he gave formal notification to this effect at the time of the deposit of his instrument of ratification. His Majesty possessed a consular court in Egypt which administered justice in accordance with the Egypt Order in Council, 1930, made under the Foreign Jurisdiction Act of the United Kingdom. This court was administered by the Government of the United Kingdom. All British subjects and all British protected persons (except Palestinians and Transjordanians) were subject to its jurisdiction from whatever part of the Empire they might come; its jurisdiction extended therefore to British subjects whose connexion with the British Empire was rather with the Dominions and India than with any territory administered by the United Kingdom. Since the recognition of the new status of the Dominions and of the fact that certain British subjects must be considered to be "citizens" or "nationals" of the Dominions when abroad, the exercise of jurisdiction by the British consular court over these Dominion citizens and nationals has been continued in accordance with the consent and desire of the Dominion Governments.[1]

29. The "national law" of His Majesty, however, under Article 9 of the convention includes the laws of all parts of the

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[1] There are, however, in fact no precise rules to determine when a given British subject must be regarded as being a citizen of a particular Dominion. Apart from the fact that the United Kingdom and some of the Dominions have passed no nationality legislation other than legislation which defines who are British subjects, it would not be true to say with regard to a Dominion which has, by legislation, defined what classes of British subjects are its "citizens" or "nationals", that all persons who are covered by these provisions must be considered when abroad to be citizens of that particular Dominion. The legislation is framed in such terms that, if Great Britain and other Dominions were to legislate in identical terms, many cases of double British citizenship would occur. Though no precise rules appear to have been formulated, some further test on the basis of closest connexion would have to be applied to determine this question.

British Empire, including the protected states, protectorates, and mandated territories, and the law of His Majesty, which is the relevant one in any particular case, would be that of the territory within the Empire from which the individual, with reference to whom the national law had to be ascertained, originated, or with which he had the closest connexion. A reservation of consular jurisdiction by His Majesty in respect of the United Kingdom would clearly cover all cases where the national law, to which Article 9 refers, was that of a territory within the Empire, other than India and the Dominions, on whose behalf separate ratifications were deposited. Such a reservation of consular jurisdiction was made at the time of the deposit of His Majesty's ratification in respect of the United Kingdom in October 1937. However, if cases where the national law of India or of the Dominions was applicable were to be covered also, it would be necessary that similar reservations should be made when the Dominion ratifications were deposited. At the time of writing, such reservations on the deposit of the ratifications in respect of Australia, New Zealand, and India have been made. A statement was made by the delegation of the Irish Free State, at the last plenary session of the Conference, that they did not desire any reservation of consular jurisdiction in respect of Irish Free State citizens, and it would appear, since there was no such reservation accompanying the ratification in respect of South Africa, that the Government of the Union of South Africa must have been of a similar opinion as regards Union nationals. The position with regard to Canada is at the time of writing still not clear. Canada must clearly have, under the terms of the Canadian note[1] to the Conference, the same right of reservation as countries in respect of which the convention has been ratified.

There would be no right under Article 9 to set up new separate Dominion consular courts, but there is clearly a right vested in the United Kingdom and the Dominions to continue the existing consular court with jurisdiction in cases where any "national" law of His Majesty is applicable or in cases where some but not all of the "national" laws of His Majesty are applicable.

30. In order to conform with the provisions of the Montreux Convention and to provide for the exercise by a British consular court of jurisdiction in matters of personal status in the future, the Egypt Order in Council, 1937, has been made. It repeals the

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[1] See paragraph 2 above.

Egypt Order in Council, 1930, but provides that cases which have been commenced before the institution of the transitional régime will be completed in accordance with the provisions of the old Order. Article 9 of this Order defines the jurisdiction of the court for the future. Article 9 reads as follows:

> "The jurisdiction conferred by this Order extends to the persons, matters and things following:—
>
> "(1) In matters of personal status, as defined in Article 28 of the Annex to the Convention signed at Montreux on the 8th May, 1937:—
>
> (i) subject to the provisions of sub-paragraph (ii), to all cases where, in accordance with the provisions of Articles 29 and 30 of the said Annex, the person with reference to whom the national law to be applied is determined is[1] a British subject or a British protected person,[2] except (in conformity with the fourth and fifth paragraphs of Article 25 of the said Annex) where that person is a Moslem;[3]
>
> (ii) the jurisdiction conferred by this Order does not extend to cases where, in accordance with Articles 29 and 30 of the said Annex, the national law of the person concerned[4] is, at the time of the institution of the proceedings, the law of the Union of South Africa or of the Irish Free State;
>
> (iii) in cases referred to in the first paragraph of Article 30 of the said Annex, the Court may, if it thinks fit, defer assuming jurisdiction until the Mixed Tribunals have determined the law applicable. Articles 25 and 28 to 30 of the said Annex are set out in the First Schedule to this Order.
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> "(2) In criminal matters, to all crimes or offences committed in Egypt by a member of the British forces, as defined in Articles 1, 4 and 16 of the Convention signed in London on the 26th August, 1936, and to members of the British Military Mission in Egypt. The provisions of the said articles of the said convention are set out in the Second Schedule to this Order.
>
> "(3) In civil matters other than matters of personal status, to actions brought against a member of the British Forces in Egypt as defined in paragraph (2) above, or against a member of the British Military Mission where the matter arises out of his official duties and His Majesty's Ambassador, with the consent of the appropriate British authority, certifies to the Court that he considers it desirable that the action should be tried by the Court."

It will be observed that paragraph (1) of this Article 9 provides for the exercise of jurisdiction in cases of personal status in accordance with the provisions of the Montreux Convention. It will be seen that cases where the law applicable is the law of the Union of South Africa or of the Irish Free State are excluded, and that at present cases where the law applicable is that of Canada are included.

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[1] s.c. "or was, at the relevant time."

[2] Palestinian citizens and Transjordanian nationals are excluded by the definition of British protected persons in Article 2 (*c*).

[3] For an explanation of the exclusion of Moslems, see paragraph 15 above.

[4] s.c. "Where the person with reference to whom, in accordance with Articles 29 and 30 of the said Annex, the national law to be applied is determined, is, at the time of the institution of the proceedings, a Union national or Irish Free State citizen." The phrase in the Order is rather elliptical. Articles 29 and 30 do not *always* determine the national law applicable by the nationality of the person concerned at the time of the institution of the suit. No doubt, the change here is intentional but not very happy, as the "person concerned" may be dead.

31. Paragraphs (2) and (3) of this article, however, require some further explanation, and the explanation is to be found in paragraphs 3 and 4 of the preamble to the Order, which read as follows:

> "And Whereas by Article 4 of the Convention between His Majesty's Government in the United Kingdom and the Egyptian Government, signed in London on the 26th August, 1936, relating to the Immunities and Privileges to be enjoyed by the British Forces in Egypt, members of the British Forces in Egypt, as therein defined, are exempt from the jurisdiction of the Courts of Egypt to the extent set forth in the said Article, and it is expedient that provision should be made for the exercise of jurisdiction by His Majesty over such persons in Egypt:
>
> "And Whereas it has been agreed with the Egyptian Government that provisions similar to those of Article 4 of the last-mentioned Convention should apply to the members of the British Military Mission in Egypt:"

A reference to the provisions of the Immunities Convention, referred to above and reproduced in an Annex to the Order, shows that the expression "members of the British forces" covers not merely naval, military, and air force men, but also civilian officials of British nationality accompanying or serving with these forces in Egypt, and the wives and infant children of all these classes of men. All these persons are by Article 4 of the Immunities Convention removed from the jurisdiction of the Mixed Courts in criminal matters entirely, and in civil matters as regards questions arising out of their official duties. While the actual officers and men of the forces could be tried by military courts in accordance with military law for nearly all offences, it is clear that the wives and children and the civilian officials could not be tried in this way. Further, there are some offences committed by actual members of the forces which it would be necessary to punish, but which could not be tried conveniently or at all under military law. It was therefore necessary to provide for a court to deal with these criminal cases, and the course adopted has been to confer this jurisdiction on the British consular court retained for personal status matters. The Immunities Convention and the British Military Mission have been explained and dealt with in paragraphs 35 and 33 of the article in the 1937 number of the *Year Book*.[1]

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[1] p. 92.

Further, as legitimate civil claims may be made arising out of acts committed by members of the British forces in Egypt in the course of their official duties and as such claims cannot be brought in the Mixed Courts as a result of the Immunities Convention, the Order in Council provides that such claims may be heard by the Judge of the British consular court as an arbitrator, provided that both the British Ambassador and the Appropriate British Authority signify their consent to the court entertaining the claim.

32. It will be seen from Part III of the new Order that the judicial work under the new régime is conducted entirely by a Judge,[1] a Registrar,[2] and three Assistant Registrars.[3] Under the new régime, consular officers in Egypt exercise no judicial functions as such, but there is a provision for the appointment of an Assistant Judge to replace the Judge during his absence or to assist him if he has too much work, and a consular officer in Egypt could be appointed as Assistant Judge. The remaining clauses of this Order provide for the manner in which civil jurisdiction in matters of personal status, criminal jurisdiction over members of the British forces and their wives and children, and civil jurisdiction as regards claims arising out of official acts, is to be exercised.

ANNEX I

Article 13 of the Treaty of Alliance

His Majesty the King and Emperor recognizes that the capitulatory régime now existing in Egypt is no longer in accordance with the spirit of the times and with the present state of Egypt.

His Majesty the King of Egypt desires the abolition of this régime without delay.

Both High Contracting Parties are agreed upon the arrangements with regard to this matter as set forth in the Annex to this Article.

Annex to Article 13 of the Anglo-Egyptian Treaty of Alliance

1. It is the object of the arrangements set out in this Annex:

(i) To bring about speedily the abolition of the Capitulations in Egypt with the disappearance of the existing restrictions on Egyptian sovereignty in the matter of the application of Egyptian legislation (including financial legislation) to foreigners as its necessary consequence;

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[1] The new Judge is Mr. E. W. Besly, who also holds the office of Legal Adviser to the British Embassy in Cairo: Sir W. Sterry, who has presided over the British court in Egypt with such distinction for the last ten years, retired on March 31, 1938.

[2] The Registrar devotes his whole time to the work of the court and is possessed of professional qualifications. The present Registrar is Mr. Gerard.

[3] The Assistant Registrars also perform other duties in the consulates in addition to their work in connexion with the court.

(ii) To institute a transitional régime for a reasonable and not unduly prolonged period to be fixed, during which the Mixed Tribunals will remain and will, in addition to their present judicial jurisdiction, exercise the jurisdiction at present vested in the Consular Courts.

At the end of this transitional period the Egyptian Government will be free to dispense with the Mixed Tribunals.

2. As a first step, the Egyptian Government will approach the Capitulatory Powers as soon as possible with a view to (*a*) the removal of all restrictions on the application of Egyptian legislation to foreigners, and (*b*) the institution of a transitional régime for the Mixed Tribunals as provided in paragraph 1 (ii) above.

3. His Majesty's Government in the United Kingdom, as the Government of a Capitulatory Power and as an ally of Egypt, are in no way opposed to the arrangements referred to in the preceding paragraph and will collaborate actively with the Egyptian Government in giving effect to them by using all their influence with the powers exercising capitulatory rights in Egypt.

4. It is understood that in the event of its being found impossible to bring into effect the arrangements referred to in paragraph 2, the Egyptian Government retains its full rights unimpaired with regard to the capitulatory régime, including the Mixed Tribunals.

5. It is understood that paragraph 2(*a*) involves not merely that the assent of the Capitulatory Powers will be no longer necessary for the application of any Egyptian legislation to their nationals, but also that the present legislative functions of the Mixed Tribunals as regards the application of Egyptian legislation to foreigners will terminate. It would follow from this that the Mixed Tribunals in their judicial capacity would no longer have to pronounce upon the validity of the application to foreigners of an Egyptian law or decree which has been applied to foreigners by the Egyptian Parliament or Government, as the case may be.

6. His Majesty the King of Egypt hereby declares that no Egyptian legislation made applicable to foreigners will be inconsistent with the principles generally adopted in modern legislation, or, with particular relation to legislation of a fiscal nature, discriminate against foreigners, including foreign corporate bodies.

7. In view of the fact that it is the practice in most countries to apply to foreigners the law of their nationality in matters of *statut personnel*, consideration will be given to the desirability of excepting from the transfer of jurisdiction, at any rate in the first place, matters relating to *statut personnel* affecting nationals of those Capitulatory Powers who wish that their Consular authorities should continue to exercise such jurisdiction.

8. The transitional régime for the Mixed Tribunals and the transfer to them of the jurisdiction at present exercised by the Consular Courts (which régime and transfer will, of course, be subject to the provisions of the special convention referred to in Article 9)[1] will necessitate the revision of existing laws relating to the organization and jurisdiction of the Mixed Tribunals, including the prepara-

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[1] The Immunities Convention referred to in paragraph 31 above.

tion and promulgation of a new Code of Criminal Procedure. It is understood that this revision will include amongst other matters:

(i) The definition of the word "foreigner" for the purpose of the future jurisdiction of the Mixed Tribunals;

(ii) The increase of the personnel of the Mixed Tribunals and the Mixed Parquet, which will be necessitated by the proposed extension of their jurisdiction;

(iii) The procedure in the case of pardons or remissions of sentences imposed on foreigners and also in connexion with the execution of capital sentences passed on foreigners.

Paragraph (xviii) of the Agreed Minute.

With regard to paragraph 6 of the Annex to Article 13, it is understood that questions relating to this declaration are not subjects for the appreciation of any courts in Egypt.

ANNEX II

R.O.J.

Article 27. The Mixed Tribunals shall also take cognizance of suits and matters relating to personal status in cases wherein the law to be applied according to the terms of Article 29 is a foreign law.

Article 28. Personal status comprises: suits and matters relating to the status and capacity of persons, legal relations between members of a family, more particularly betrothal, marriage, the reciprocal rights and duties of husband and wife, dowry and their rights of property during marriage, divorce, repudiation, separation, legitimacy, recognition and repudiation of paternity, the relation between ascendants and descendants, the duty of support as between relatives by blood or marriage, legitimation, adoption, guardianship, curatorship, interdiction, emancipation, and also gifts, inheritance, wills, and other dispositions *mortis causa*, absence and the presumption of death.

Article 29. The status and capacity of persons shall be governed by their national laws.

The fundamental conditions of the validity of marriage shall be governed by the national law of each of the parties thereto.

In matters concerning relations between the husband and wife, including separation, divorce, and repudiation and the effects thereof upon their property, the law to be applied shall be the national law of the husband at the time of the celebration of the marriage.

Reciprocal rights and duties as between parents and children shall be governed by the national law of the father.

The duty of maintenance shall be governed by the national law of the party against whom the claim is made.

Matters relating to legitimacy, legitimation, and the recognition and repudiation of paternity shall be governed by the national law of the father.

Questions relating to the validity of adoption shall be governed by the national law of the adopting party as well as by that of the adopted person. The effects of adoption shall be governed by the national law of the adopting party.

Guardianship, curatorship, and emancipation shall be governed by the national law of the person under the incapacity.

Inheritance and wills shall be governed by the national law of the deceased or of the testator.

Gifts shall be governed by the national law of the donor at the time of the gift.

The rules of the present article shall not affect provisions relating to the legal position of immovable property in Egypt.

Article 30. Should the nationality of a person be unknown, or should he at the same time possess the nationality of each of several foreign states, the judge shall decide what law shall be applied.

Should a person at the same time possess the nationality of Egypt under Egyptian law and of one or more foreign states under the laws of the state or states concerned, the law to be applied shall be the Egyptian law.

Article 31. The expression "national law" shall be understood to mean the provisions of the internal law of the country in question to the exclusion of its rules of private international law.

Article 32. Rules of procedure prescribed by a foreign law shall not apply in so far as they are incompatible with Egyptian rules of procedure.

Article 56. Notwithstanding the provisions of Article 27, the Mixed Tribunals shall not have competence in matters of personal status where the law applicable in accordance with the provisions of Article 29 is that of a High Contracting Party to the Convention regarding the abolition of the Capitulations in Egypt, who, in accordance with Article 9 of that Convention, has reserved jurisdiction in personal status for his Consular Courts and that reservation has not been withdrawn.

Convention

Article 9. Any of the High Contracting Parties who possess at present Consular Courts in Egypt, may retain such courts for the purposes of jurisdiction in matters of personal status in all cases in which the law applicable is the national law of the High Contracting Party concerned.

Any such High Contracting Party who desires to exercise the above right shall notify the Royal Egyptian Government to this effect at the time of the deposit of his instrument of ratification of the present Convention.

At any time during the transition period any High Contracting Party may make a declaration renouncing his consular jurisdiction. Such declaration shall take effect as from the 15th October following the date on which it is made. No new proceeding shall be entertained after the date on which a renunciation of jurisdiction takes effect, but any proceeding already instituted may be continued until finally disposed of.

No Consular Court shall be maintained after the 14th October, 1949. On that date all proceedings pending before the said Consular Courts shall be remitted to the National Tribunals at the stage they have then reached.

Article 10. In matters of personal status, the jurisdiction which is competent shall be determined by the law to be applied.

The expression "personal status" refers to the matters specified in Article 28 of the Règlement d'Organisation Judiciaire Mixte.

The law to be applied shall be ascertained in conformity with the rules set out in Articles 29 and 30 of the said Règlement.

Egyptian Declaration

3. *Personal Status.* The Royal Egyptian Government, having already, and more particularly in the Establishment Treaties which it has concluded with Iran and Turkey, spontaneously adopted the principle that, in matters of personal status, the personal law should apply, intends to adopt the same principle with regard thereto in the future.

As regards the rules of procedure which the Royal Egyptian Government intends to enact for cases of personal status, these will be applied provided that no substantive rule of the foreign national law prevents their application.

THE NYON ARRANGEMENTS

Piracy by Treaty?

THE word "piracy" has been so much used in this connexion, provoking discussion amongst the learned almost to the same extent as it appeals to the imagination and emotions of the masses, that an introductory explanation of the position seems necessary before proceeding further.

I

It is necessary to distinguish in the first place between piracy *jure gentium* and additional acts that may be called or made piracy by treaty and/or municipal law. No one will dispute that piracy *jure gentium* is a conception applying to certain forms of violence at sea (an exact definition is not required here), and that international law, by way of exception to its ordinary rules with regard to jurisdiction, allows those committing it, whatever their nationality or the flag of their ship, to be arrested by any vessel and to be tried by the courts of any state. Both on principle and authority it is also fairly certain, though the other view is sometimes expressed, that an act done by a commissioned officer of a state under the authority of a state is never piracy *jure gentium*, even if it violates the rules of international law with regard to warfare or otherwise.[1] An essential element of piracy *jure gentium* is that the acts are done by a person in defiance of the laws of all states and for which no state can be held responsible (the native rulers of Morocco, Algiers, or Tunis, who in old days may have approved the acts of the "Barbary" pirates who were their subjects, were at that time considered to be outside the pale of international law). This element explains and justifies the exceptional rule with regard to jurisdiction. Though naval forces of one side may sometimes have exacted summary but extra-legal vengeance on members of the enemy forces who had barbarously violated the rules of war, there seems to be no instance where a naval officer of the enemy has been tried formally by the courts of a country for piracy on account of inhuman violations of the rules of war committed by him in the course of hostilities, nor any case of neutrals interfering and trying such an officer.

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[1] Cp. the position with regard to "war crimes" committed on land by members of belligerent armed forces, for which they may be punished by their enemy if captured. The prevailing view is that "violations of the rules of war are war crimes only when committed without an order of the belligerent government concerned". Oppenheim, Vol. II, 5th ed., p. 453.

The municipal law of different countries may and often does assimilate to piracy *jure gentium* other acts which are not covered by it and may call them piracy (for instance the act of a crew in revolt against owner or master in seizing and making off with the ship), but they cannot, in respect of such acts committed by foreigners on the high seas, claim the exceptional jurisdiction which applies to piracy *jure gentium.* Further, two or more states may by treaty agree to add other acts to the categories of violence at sea covered by piracy *jure gentium*, and may agree to exceptional jurisdictional provisions with regard to such acts (as for instance slave trading or arms running), but such treaties can only govern the relations of the parties to them unless and until by wide acceptance they become part of the general law of nations. Moreover, in practice the exceptional jurisdictional provisions in such treaties have always fallen short of the provisions applicable to piracy *jure gentium.*

Great indignation was caused by the sinking by German submarines during the Great War, contrary to the rules of maritime warfare with regard to the exercise of belligerent rights at sea, of the merchant vessels of belligerent and neutral powers, and by the loss of non-combatant and neutral lives and property involved; this action was often described popularly as piracy, but no captured submarine officers, who had acted in accordance with the orders of their government, were tried as pirates.

Being desirous, however, of preventing this practice in any future war, the five great Allied naval powers (U.S.A., British Empire, France, Italy, and Japan) signed a treaty at the Washington Naval Conference of 1922,[1] which provides (Article 1) that

> "Among the rules adopted by civilised nations for the protection of the lives of neutrals and non-combatants at sea in time of war, the following are to be deemed an established part of international law:—
>
> "1. A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized. A merchant vessel must not be attacked unless it refuses to submit to visit and search after warning or to proceed as directed after seizure. A merchant vessel must not be destroyed unless the crew and passengers have first been placed in safety.
>
> "2. Belligerent submarines are not in any circumstances exempt from the universal rules above stated; and if a submarine cannot capture a merchant vessel in conformity with these rules, the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested."

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[1] 1922, *Cmd.* 1627, p. 19.

Article 2 invited other powers to express their assent to the statement of established law in Article 1, so that there might be a clear public understanding throughout the world of the standards of conduct by which the public opinion of the world was to pass judgment upon future belligerents.

It was then provided as follows:

> "*Article 3.* The signatory powers, desiring to ensure the enforcement of the humane rules of existing law declared by them with respect to attacks upon and the seizure and destruction of merchant ships, further declare that any person in the service of any power who shall violate any of these rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy and may be brought to trial before the civil or military authorities of any power within the jurisdiction of which he may be found.
>
> "*Article 4.* The signatory powers recognise the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914–1918, the requirements universally accepted by civilised nations for the protection of the lives of neutrals and non-combatants, and to the end that the prohibition of the use of submarines as commerce destroyers shall be universally accepted as a part of the law of nations they now accept that prohibition as henceforth binding as between themselves and they invite all other nations to adhere thereto."

Article 1 of this treaty may justly claim to be a correct statement of the rules of warfare at sea. Article 4 was intended as a new legislative provision. It was not accepted, however, by other nations, and some of the signatory powers became doubtful about it. It was the principal reason why this treaty was not ratified and has never come into force. Article 3 was also new legislation. It deliberately set out to extend piracy *jure gentium* with all its consequences to cover violations of the rules in Article 1 by the *personnel* of any belligerent war vessel, whether acting under the orders of their government or not. It did not escape criticism, and it has never come into force.

The Treaty of 1922 having failed to achieve its object, chiefly on account of Article 4 and also partly on account of Article 3, the same five naval Powers inserted the following provisions in Part IV of the Naval Limitation Treaty signed at London in 1930:[1]

> "The following are accepted as established rules of international law:
>
> "1. In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subject.
>
> "2. In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers

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[1] 1930, *Cmd.* 3556, p. 31.

in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

"The High Contracting Parties invite all other powers to express their assent to the above rules."

It will be seen that Part IV of the London Treaty is in essence the same as Articles 1 and 2 of the Washington Treaty of 1922, and that not only is Article 4 of the 1922 Treaty dropped but so also is Article 3. The idea, therefore, of incorporating into piracy *jure gentium* inhuman violations of the rules of warfare by naval commanders acting under the orders of their government was definitely abandoned.

The London Treaty of 1930 was only ratified on behalf of the British Empire, the United States, and Japan. France and Italy, for reasons which had nothing to do with Part IV, never ratified it, and for this reason, although the provisions of Part IV were generally acceptable, they remained unconsecrated by any general treaty instrument. Subsequently, by a procès-verbal signed on behalf of the United States of America, all members of the British Commonwealth of Nations, Japan, Italy, and France at London on November 6, 1936, in which the rules of Part IV of the treaty of 1930 are repeated, it is recorded that Italy and France accept them, and the Government of the United Kingdom is requested to invite all other powers to accept them also. By September 6, 1937, twenty other powers had done so.

Since the Great War a good deal of consideration had been given to the rules which should apply to operations by belligerent aircraft used instead of war vessels for the purpose of the exercise of belligerent rights at sea against merchant shipping. There has been some difference of opinion as to whether aircraft can be used for this purpose at all, but the prevailing view seems to be that they can, but that, if they are, the aircraft must observe the rules of warfare at sea, and in particular the rules (such as those contained in Part IV of the Treaty of London) for the protection of neutral and non-combatant life in warfare. This view seems to be fair and logical. The draft Rules of Aerial Warfare drawn up by the Committee of Jurists at The Hague in 1923[1] proceed generally on the basis of assimilating to aircraft the rules with regard to ships, but they deal in terms only with the visit and search of private aircraft by aircraft of the belligerent forces and not with the visit and search of ships by aircraft. A note explains that the absence from the draft of any provisions on the latter point was due to the fact that the Netherlands delegation took the view that international law only sanctioned at present the exercise of belligerent rights against neutral shipping by warships, and that the Netherlands delegation were not prepared to extend this right to aircraft. This difference of opinion, however, in no way weakens the view that, if belligerent aircraft are used against merchant vessels, they must be limited by the same rules for the protection of non-combatant life and property as belligerent war vessels.

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[1] See *American Journal of International Law*, Supplement to Vol. XVII, p. 257. These rules have never been formally embodied in any international convention and governments have objected to some of them, but they are the work of a very competent official committee which proceeded on the basis of adapting to new weapons the existing rules and principles and are the most authoritative pronouncement on the matter existing up to this moment.

The conclusion, therefore, to be drawn from what precedes is (1) that belligerent submarines and aircraft, if they interfere with merchant vessels, are subject to the same rules as war vessels with regard to the safety of non-combatant lives and the unnecessary destruction of private property at sea; and (2) that violations of these rules committed by belligerent submarines or aircraft,though a very gross and inhuman breach of the rules of international law, had not, up to September 1937, been made piracy, exposing the responsible officers to trial as pirates. The view that an officer acting under the orders of a responsible state cannot be a pirate seems clearly to have prevailed in view of the non-acceptance and abandonment of the contrary proposition in Article 3 of the Washington Treaty.

It is now necessary to consider the position in a civil war where both sides attempt to employ naval action against merchant shipping on the high seas, and where the insurgent side has not been recognized as a belligerent community. (If it has been, of course, the position is clearly the same, so far as the questions now under consideration are concerned, as in an international war.) Assuming that the refusal to recognize belligerency is legally justified—a controversial question not under consideration here—it seems to be clear that the action of either the government or insurgent war vessels in interfering with foreign shipping on the high seas is illegal, and that foreign powers are justified, not merely in protesting and claiming damages for such action, but also in using force to protect their merchant shipping from interference by the combatants' war vessels. But can the personnel of the combatant war vessels, who do interfere with shipping, be regarded and treated as pirates? So far as the vessels of the legitimate government are concerned, it seems clear that they cannot, and no qualified lawyer has expressed a contrary opinion. Although their actions are unlawful they cannot be pirates because they are acting under the orders of a recognized sovereign government, and the position is the same whether or not in the course of their operations against foreign merchant shipping, all of which are illegal, they observe the limitations prescribed by the rules for warfare at sea. But what about the war vessels of the insurgent authorities? It is sometimes argued that, as the officers of these vessels forcibly interfere with and seize shipping on the high seas without being covered by the authority of any recognized sovereign government, this is piracy *jure gentium.*

Such a view has never been acted upon in practice by any state in regard to the naval forces of insurgents whose movement had achieved any magnitude and possessed a cohesion and organization, remotely resembling a government, even in cases where the movement was too small and insufficiently established to afford any justification for a recognition of belligerency.[1]

The view which has been followed in practice is ably supported in theory by the majority of writers who point out (*inter alia*) that insurgents can only gain recognition of belligerency by achieving a certain measure of success in fighting and that, where there is an insurgent government or administration of sufficient cohesion for other powers to deal with it, even on a *de facto* basis, this administration must be regarded as capable of assuming responsibility for the acts of its officers. Consequently officers acting under its orders cannot be regarded in theory, as they are not in fact, as analogous to pirates. Further, if in an international war naval belligerent officers, even when they violate the rules of naval warfare against neutral shipping, are not pirates *jure gentium* for the reason that they are acting under the orders of a responsible government, and if in a civil war an insurgent government is regarded as possessing sufficient responsibility to prevent its naval officers from being pirates when they conform to the laws of war, even though their actions may be illegal because they are not properly qualified to exercise belligerent functions, such officers cannot become pirates if and when, on the orders of the insurgent government, they transgress the rules of naval warfare. Moreover, technically these rules of naval warfare do not apply to them.

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[1] Even in the case of the Cartagena naval insurgents of 1873, an insurrection which never achieved any governmental organization at all, though orders were given by the other powers to their naval authorities in the Mediterranean that they should capture insurgent war vessels interfering with merchant shipping and arrest their crews, it was never proposed that they should be tried as pirates by the courts of the powers whose vessels arrested them. On the contrary, they were to be handed over to the authorities of the legitimate government.

Though the destruction by naval vessels or aircraft of merchant ships with loss of life amongst their non-combatant crews may not be piracy, whether it is committed in an international war or by either side in a civil war, it is a very grave infraction of the rules of international law which may justly entitle other states whose ships and nationals suffer to resort to special measures to put an end to it, measures stronger than could justifiably be taken in regard to many other violations of international law. Such measures may take the form of direct naval action against the vessels, surface or submarine, or the aircraft, committing these acts, and it is arguable that it might be justifiable as a reprisal to punish individually the officers and crews committing such actions, or, in other words, to treat them as pirates as a reprisal.

II

After this somewhat lengthy introduction one can proceed to a discussion of the Nyon Arrangement itself. Though the Spanish civil war has from the beginning been a war of some magnitude, carried on by fully organized governments on both sides, no power has taken the step of recognition of belligerency. Consequently other powers have denied the right of either side in the conflict to exercise belligerent rights at sea, and all of them have protested against interference with their merchant shipping as unlawful and have reserved the right to claim damages. Furthermore, those powers who possessed the naval resources to do so have protected by naval action their merchant shipping from interference on the high seas whenever possible. No government has taken the line that the naval forces on either side in Spain were legally pirates because of their seizures of shipping. The interferences with foreign shipping, however, have not been confined to action such as would be lawful, assuming that belligerency had been recognized. There have been instances, going back almost to the beginning of the conflict, of attacks on merchant vessels and their destruction, attended by loss of life of the crew, by gunfire from surface vessels, torpedoes from submarines, and bombs from aircraft. In the late summer of 1937 these attacks were becoming more frequent; great indignation was caused, and the word "piracy" was again much used in this connexion. The tension was increased because at the same time attacks had been made by submarines and aircraft against some of the war vessels of the powers in the Mediterranean. The agreement signed at Nyon on September 14, 1937,[1] dealing with attacks by submarines, and the additional agreement signed at Geneva on September 17,[2] dealing with attacks by surface vessels and by aircraft, embodied the special measures adopted by certain powers to deal with this illegal and inhuman destruction of "neutral" non-combatant life and property. The preamble of the Nyon Arrangement reads as follows:

> "Whereas arising out of the Spanish conflict attacks have been repeatedly committed in the Mediterranean by submarines against merchant ships not belonging to either of the conflicting Spanish parties; and
>
> "Whereas these attacks are violations of the rules of international law referred to in Part IV of the Treaty of London of April 22, 1930, with regard to the sinking of merchant ships and constitute acts contrary to the most elementary dictates of humanity, which should justly be treated as acts of piracy; and
>
> "Whereas without in any way admitting the right of either party to the conflict in Spain to exercise belligerent rights or to interfere with merchant ships on the high seas even if the laws of warfare at sea are observed and without prejudice to the right of any participating Power to take such action as may be proper to protect its merchant shipping from any kind of interference on the high seas or to the possibility of further collective measures being agreed upon subsequently, it is necessary in the first place to agree upon certain special collective measures against piratical acts by submarines:"

It will be observed that the parties, while maintaining the position that in this conflict all belligerent action on the high seas against merchant shipping is illegal and may be resisted, state that those attacks by submarines which would be contrary to the rules in Part IV of the Treaty of London of 1930 call for special collective measures as they are acts contrary "to the most elementary dictates of humanity, which should justly be treated as acts of piracy". It will be convenient to reserve to the end all consideration of the significance of this reference to piracy, and to see first what exactly were the collective measures which were agreed upon.

Any submarine which attacks a merchant vessel "not belonging to either of the conflicting Spanish parties" "in a manner contrary to the rules of international law referred to" in Part IV of the London Treaty of 1930, or which is "encountered in the vicinity of a position" where such a vessel has been recently so attacked "in circumstances which give valid grounds for the belief that the submarine was guilty of the attack" is to be counter-attacked and, if possible, destroyed by the naval forces of the participating powers. In the western Mediterranean (with the exception of the Tyrrhenian Sea) this action is to be carried out by the British and French fleets on the high seas and in the territorial waters of the participating powers: in the eastern Mediterranean, the navy of each participating power operates in its own territorial waters, and the British and French fleets operate on the high seas up to the entrance of the Dardanelles but excluding the Adriatic. The areas allocated to the British and French fleets were to be divided between them in accordance with an arrangement on which they had already agreed. (On September 13 this agreement had not been published.)

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[1] 1937, *Cmd.* 5568.

[2] 1937, *Cmd.* 5569.

In order to minimize the risk that an innocent submarine belonging to a participating power should be attacked in error, the parties agreed that their submarines should not navigate except after notification and on the surface accompanied by a surface ship anywhere in the Mediterranean, with the exception of certain specified areas reserved for exercise and delimited in an annex to the agreement. Further, to assist in the effective protection of merchant shipping, certain routes through the Mediterranean were scheduled in another annex as those which shipping should be advised to follow.

The additional agreement signed at Geneva with regard to similar "piratical acts" committed by surface vessels and aircraft "in violation of the humanitarian principles embodied in the rules contained in Part IV of the London Treaty of 1930" is supplementary to the Nyon Arrangement, and provides that the war vessels of the participating powers engaged in the protection of merchant shipping in accordance with the Nyon Arrangement will, if they witness an attack of this kind, in the case of an attack by an aircraft, open fire on the aircraft, and in the case of an attack by a surface vessel "intervene to resist it within the limits of its powers, summoning assistance if such is available and necessary". (It is to be noted that this agreement proceeds on the basis that in operations against merchant shipping aircraft are not exempt from the limitations applicable to war vessels, the difference between the language of the additional agreement and that of the Nyon Arrangement in the references to the London Agreement of 1930 being no doubt due to the fact that the London Agreement does not refer to aircraft.)

The signatories to these two agreements were the United Kingdom, Bulgaria, Egypt, France, Greece, Roumania, Turkey, the

U.S.S.R., and Yugoslavia; but it was announced at the time that the collaboration of Italy—the only Mediterranean power (except Albania) not a signatory—was desired and that the Nyon Conference powers hoped that she would accede later. It was for this reason that the Tyrrhenian Sea was omitted from the areas allocated to the British and French fleets, and that the Nyon Arrangement contained provision for re-allocation of these areas.

It was announced in the press that on September 30 an agreement had been concluded at Paris between naval experts of the United Kingdom, France, and Italy providing for the participation of Italy and the collaboration of the Italian fleet. This agreement has not been published, but it was announced that under it the Mediterranean was re-divided into a number of zones which were allocated to the British, French, and Italian fleets respectively, and that another trade route was added to those already specified in the annex.

The immediate effect of these agreements was the cessation of attacks on "neutral" merchant shipping on the high seas leading to loss of life. Unfortunately, in January 1938 further such attacks by submarines and aircraft occurred.

In consequence of this, at the beginning of February it was announced that the British, French, and Italian war vessels engaged in the protection of merchant shipping in the zones in the western Mediterranean had been given by their respective governments stricter orders with regard to submarines; in future any submarine found submerged in this area would be considered as contemplating an attack on merchant shipping and would be attacked, whereas under the Nyon Arrangement a submarine would only be attacked if a merchant vessel had recently been attacked by a submarine, and there was reason to believe that this submarine was guilty. This extension of the Nyon Arrangement was made by the agreement of the three naval powers responsible for the protection of shipping on the high seas, and with the assent of the other powers. It was communicated to the Barcelona and Salamanca Governments.

III

Having seen what the Nyon Arrangements provided, it is possible now to revert to the question of piracy—did these Arrangements purport to make attacks on merchant vessels in the Mediterranean in contravention of the London rules of 1930 piracy by treaty? They provided for direct naval action against the guilty surface vessel, aircraft, or submarine, which might lead to its destruction. The action was to be taken by naval patrols of the participating powers (in fact almost exclusively by three of these powers) for the protection of all merchant vessels except Spanish vessels. In the preamble these attacks on merchant vessels are described as "piratical acts" or as acts "which should justly be treated as piracy", but there is no provision like Article 3 of the Washington Treaty of 1922 providing for the trial and punishment by any power of the individuals guilty of them as for an act of piracy, and no reference is made to the Washington Treaty. Such trial and punishment is, however, the essential attribute of piracy *jure gentium.*

In view of this, it seems difficult to contend that the Nyon Arrangements have revived the course abandoned after the failure of the Washington Treaty of 1922, and that they purport to widen by treaty the scope of piracy *jure gentium*, so as to extend it to cover inhuman violations of the rules of war committed by persons acting under the orders of a responsible government or authority. This conclusion is strengthened by the fact that under the Nyon Arrangements no action is taken as a result of such attacks on Spanish merchant vessels, though the merchant vessels of belligerents enjoy equally with those of neutrals the protection of the London rules, and Article 3 of the Washington Treaty subjected unlawful attacks on both classes of vessels to the full consequences of piracy *jure gentium.* If such attacks were really being made piracy by treaty under the Nyon Arrangements, it would be illogical to except attacks on Spanish (belligerent) merchant vessels. It would seem that the references to piracy in the preamble (no doubt the Nyon Conference felt compelled to introduce the word "piracy" somehow, in view of its popular use and appeal in this connexion) must be interpreted as meaning that such attacks are morally as disgraceful as piracy, and that it *would* be justifiable to treat them as such, but the participating powers, while placing this on record, have thought it better to do something else, namely, to meet them by forcible direct naval action taken collectively and for the collective benefit of all vessels not "belonging to either of the parties to the Spanish conflict".

NOTES

Since the issue of the 1937 volume of the *British Year Book of International Law*, a change has occurred in the editorship of the *Year Book*. Sir John Fischer Williams has resigned the post of Editor, being unable to find the time necessary for the work, and Professor A. D. McNair has been appointed Vice-Chancellor of the University of Liverpool and found that this new post would absorb all his time. The *Year Book* owes to both of them a debt of gratitude for their devoted labours in its service. Sir Cecil Hurst has agreed to resume the post of Editor of the *Year Book*, which he held from 1921 to 1928.

Professor McNair has been succeeded as Whewell Professor of International Law at Cambridge by Dr. H. Lauterpacht of the London School of Economics, a member of the Editorial Committee of the *Year Book*.

Lord Wright has joined the Editorial Committee.

PERMANENT COURT OF INTERNATIONAL JUSTICE

The vacancy in the Court due to the death of Baron Rolin-Jaequemyns, in July 1936, was filled by the election of Professor Charles De Visscher (Belgium) on May 27, 1937.

On July 7, 1937, occurred the death of M. Ake Hammarskjöld, who had only been elected a judge in the autumn of 1936. This vacancy has not yet been filled.

INEQUITABLE TREATIES

Professor Verdross has drawn the attention of the Editor to the review of the *Zeitschrift für öffentliches Recht* at pp. 254 and 255 of the *British Year Book* for 1937 and to the criticism there made of Professor Verdross' views on the binding character of inequitable treaties. Professor Verdross states that his views have been misunderstood in the review in question and that they are set out in greater detail in an article on Forbidden Treaties in International Law at pp. 571–7 of Vol. XXXI of the *American Journal of International Law*.

Editor.

INSTITUTE OF INTERNATIONAL LAW

The session of the Institute of International Law for 1937 was held at Luxemburg from August 29 to September 4. The meeting will be counted as one of the more successful sessions of the Institute.

It had been intended to hold the session at Edinburgh, but a variety of reasons rendered this impossible and the Bureau of the Institute decided to hold the meeting at Luxemburg instead of in Scotland.

The total attendance at the Luxemburg meeting was fifty-seven, thirty-one members and twenty-six associates. All the English members and associates of the Institute attended the session with the exception of Sir. T. Barclay and Dr. Baty. At the Administrative Meeting held on the first day of the session, Professor Brierly was promoted to the rank of member, and Mr. W. E. Beckett, C.M.G., was elected as an associate.

Considerable importance attached this year to the various questions discussed at the administrative meetings. The Carnegie Endowment at Washington has for many years past given a generous annual subvention to the Institute, but this subvention has now been withdrawn. For the future, the Institute will be obliged to depend entirely on its own financial resources. These are sufficient to enable the Institute to continue its activities, provided that rigid economy is practised, but in future it will probably be necessary to hold sessions of the Institute biennially instead of annually.

In his address at the opening meeting of the Session, the President (Sir Cecil Hurst) abandoned the usual type of presidential address and devoted himself to the scientific side of the Institute's work. The following is a résumé of the President's remarks.

After a reference to the general regret that circumstances had obliged the Institute to abandon the idea of meeting at Edinburgh, where it would have been right for the Institute to pay a tribute to the views of Professor Lorimer, one of the founders of the Institute, the President passed to a consideration of the question whether, at the present time, it was not incumbent upon the Institute to take greater account of the principle which must, he presumed, be held by all those who believed in the existence and in the importance of the rules of international law, namely, that the rules of international law as such were binding upon states irrespective of any formal act of consent on their part. The gist of Professor Lorimer's teaching was that, from the moment that two states existed, international law necessarily existed also. However imperfectly and irregularly the rules of international law were known and acted upon, nevertheless they existed and were binding upon the states in question. What was important was, therefore, to determine the scope and the content of such rules.

Because international law is international, no state can make or claim to make that law by itself. Similarly, no state can expect that in the formulation of a rule of international law account shall be taken of no interest other than its own.

Despite the importance of the researches which are made into the *sources* of international law, it is even more important to devote attention to the question how and when the material drawn from such sources passes into the category of accepted rules of international law, and to formulate those rules.

The experience of recent times shows that this problem is one of greater difficulty than would perhaps have been supposed. That experience shows that it is work which can only be done by scientific bodies like the Institute of International Law and, fortunately, the field of inquiry is one which lies directly within the purposes for which the Institute was founded. It is work which cannot be done by states, or by the representatives of states; it must be done by those who are working in a private and unofficial capacity.

The rules binding on states because they are rules of international law are something quite distinct from treaties, which are binding on states only by virtue of the acceptance of those treaties by a state which becomes a party to them.

The deliberative work which is necessary before a rule of international law can be formulated, if done by persons acting on behalf of a state, furnishes, as soon as the agreed formula is found, all the elements that are required for the successful conclusion of a treaty, but, if done in such circumstances, brings one face to face with the difficulty that arises from the fact that when states are meeting in conference the conclusions of the conference are not binding upon the states unless they have accepted them. If there is agreement, the results can be embodied in a conventional form; if there is no agreement, there will not be that necessary consensus in the formulation of the rule to justify its presentation as a rule of international law.

To confirm the views enunciated by the President, he referred to the efforts of the Codification Conference at The Hague in 1930. The Conference, which had met after the most careful preparation under the auspices of the League and with a programme limited to three subjects which were regarded as ripe for codification, achieved nothing except one convention and some protocols dealing with nationality. These, so far as they possessed any binding force, did so because they were brought into being as treaty engagements.

The inherent difficulty in the work of codification of the rules of international law by states themselves is the uncertainty of the future position of any state which refuses to give its consent to the rules agreed upon, or makes reservations with regard to them.

The Codification Conference in 1930 illustrates another aspect of the problem. From the moment when states, or their representatives, meet in conference to determine what are the rules of international law upon a given subject, the tendency is for them to devote their energies to the shaping of the rules of international law in order to suit their own interests. As said above, if international law consists of rules which are operative between two or more states, they cannot be made or altered to suit the convenience of one state alone. Nor can they be made or altered by one state alone. It would seem as if circumstances forced one to admit the further principle, namely, that the formulation of the rules of international law cannot be undertaken by the states themselves because to do so is to make them judges in their own cause.

The Pan-American efforts at codification have, no doubt, achieved a greater measure of success than the Codification Conference at The Hague in 1930, but the results have, in general, been embodied in treaties, and the position is obscure as to the extent to which states participating in these Pan-American Codification Conferences are bound by the conclusions in cases where they have refused to accept the treaties, or have annexed reserves. Yet it is of the essence of international law that it is binding on states irrespective of any formal act of consent.

The work achieved by the Naval Conference which met in London in 1908 and 1909 and drew up the Declaration of London was used by the President as a further argument to confirm the contention that the work of codification cannot be undertaken by states themselves. The Conference in London met at a moment when it was the desire and interest of every state which took part to come to an agreement on the rules of maritime warfare to be enforced by the International Prize Court, whose establishment had been agreed upon at The Hague. A very large measure of agreement was reached, yet the delegates found themselves obliged to embody the rules which they formulated in a Declaration, containing a series of final clauses which entirely vitiate all possibility of regarding the Declaration of London as the formulation of a series of rules of international law, i.e. rules which are binding on a state irrespective of its own consent. Reference was made to Article 66, which limits the obligation to ensure the mutual observance of the rules to the case of a war in which all the belligerents are parties to the Declaration, to Article 68, which prescribes the date at which the Declaration is to take effect, and to Article 69, which gives to each of the parties power to denounce it.

If the work of formulating the rules of international law which are binding upon states as such cannot be done by the states themselves, or their representatives, it must be done by persons or bodies invested with an unofficial character, and for that work the Institute of International Law is pre-eminently qualified, both by the terms of its charter, and by the lines upon which its scientific activities are conducted. The work must be done upon a scientific basis, i.e. with the intention of finding out and determining, as the result of studying and applying the material available, what is the true rule of international law. It cannot be done by endeavouring to formulate a rule upon the basis of the momentary interests of individual states.

Great though the help may be which the Permanent Court of International Justice can render to the cause, it is restricted at present by the small number of cases which are submitted to the Court where the point at issue is one of international law in the true sense of the term.

In conclusion, the President urged the importance, in view of the limited time of which the Institute can dispose, and the infrequency of its meetings, that the efforts of the Institute, so far as they are concerned with the field of public international law, should be restricted to the examination, discussion and formulation of rules which fall within that term in the strict sense of the word, namely, rules binding upon states irrespective of any formal act of acceptance, binding upon them in virtue of their character as members of the society of nations.

At the first of the meetings for the discussion of scientific subjects, the Institute took a decision as to its method of work. For some years past a feeling has been growing that it would be well, during the sessions, for the work of the Institute to be carried on in separate sections meeting simultaneously, one section being devoted to questions of public international law and the other section being devoted to questions of private international law, the resolutions adopted in each section being subsequently brought before a plenary session of the Institute for confirmation.

It was decided at Luxemburg to try the new system, by way of experiment.

Three subjects were dealt with in the domain of public international law and two in the domain of private international law. These were the juridical foundations of the conservation of the riches of the sea, the equitable jurisdiction of the international judge, the juridical character of advisory opinions given by the Permanent Court of International Justice, conflicts of law in respect of labour contracts, and the regulation of criminal jurisdiction in case of offences committed on board private aeroplanes. Resolutions were adopted on each subject.

One of the committees of the Institute is dealing with the subject of the sources of international law. The final report of this committee has not yet been prepared, but, at the close of the session, Professor Verdross, the reporter, gave an outline of the proposals which the Committee is likely to put forward and invited any members of the Institute, who felt so disposed, to send him their observations. The text of Professor Verdross' remarks is to be found at p. 184 of the 1937 *Annuaire* of the Institute.

C.

ACADEMY OF INTERNATIONAL LAW

THE session of the Academy of International Law at The Hague in 1937 began on July 5 and lasted until August 27.

Two of the courses of lectures were given by Englishmen. Dr. Lauterpacht of the London School of Economics gave the long course of sixteen lectures on the general principles of public international law, and Mr. D. J. Llewellyn Davies gave a course of ten lectures on the general rules applicable to conflicts of laws.

The total number of persons who entered their names to attend the Academy courses was 367, a slightly higher figure than in 1936, when it was 354. The total number of nationalities represented was 36. Of those who attended the lectures 153 were of Dutch nationality, 214 were not. This again was a slightly better figure than in 1936. In that year 46 per cent. of the students were of Dutch nationality as against 40 per cent. in 1937. The authorities of the Academy endeavour to restrict the number of persons of Dutch nationality who attend the lectures, as they feel that it is the foreign element for which the work of the Academy is particularly valuable. Seventy of those who attended the lectures were women.

Only nine of the persons attending the lectures came from Great Britain. It is a misfortune that so few of those who profit by the lectures should come from this country. Germany sent 37 students, France 34, and the United States of America 23. Spain, Belgium, and Czechoslovakia each sent more students to attend the lectures than did Great Britain.

Of the 367 persons who attended the lectures in 1937, 111 were doctors in law or advocates, 85 were law students, 38 were members of the diplomatic or consular services of their countries or were civil servants, 24 were professors, 10 were officers of the naval or military forces, and one was a judge. In 71 cases the profession was not stated. It is calculated that 60 per cent. of the students might be regarded as of the post-graduate type.

An increasing number of the students who attend the lectures of the Academy receive help either from their governments or from other sources so as to enable them to do so. Scholarships are given by the Carnegie Endowment at Washington, by the Academy out of its own funds, by the Netherlands Government (exclusively for the use of foreigners), by the Governments of France, Germany, and Czechoslovakia, and by the French, Belgian, Austrian, Italian, Swedish, and Swiss Rotary Clubs. The University of Cambridge gave help in two cases to students, and the London School of Economics in one.

The average attendance at each of the lectures was 60, if the whole session of the Academy is taken together for the purposes of the calculation. As is well known, the session is divided into two periods and it seems that the second half is more popular than the first, for during the latter period the average attendance at each lecture was 63 and during the earlier period the average was 57.

The session of the Academy for 1938 will open on July 4. Among the lecturers will be Professor H. A. Smith, Professor of International Law at the University of London, who will give a course of five lectures on modern developments in the laws of naval warfare, and Mr. John Foster, of All Souls, Oxford, who will give a course of ten lectures on the general rules of private international law.

Lectures at the Academy are all given in French. No fees are charged for attendance at the courses; all that is necessary is that persons who desire to attend should apply for a ticket of admission to the Secretary of the Governing Body of the Academy of International Law, Peace Palace, The Hague. Full information can be obtained from him as to the dates and hours and subjects of the lectures; and also as to railway facilities and reduction of travelling charges, and as to obtaining accommodation at The Hague at reasonable rates.

Advice can also be obtained from the Secretary of the English Association of former Academy students (Mr. J. C. Hales, 1 Essex Court, Temple, E.C. 4).

C.

THE SECOND INTERNATIONAL CONGRESS OF COMPARATIVE LAW, 1937

There appears to be general agreement as to the success of the Congress of Comparative Law which was held from August 4 to August 11, 1937, at The Hague. There was, it is true, a falling off in attendance, but this was not a matter for regret as the absentees were mainly of the type which in 1932 treated the Congress as an opportunity for "joy riding". A feature of the Congress was the increased strength of the British and German delegations, the former being led by Lord Macmillan and containing within its ranks a very gratifying proportion of the younger generation of English and Scots lawyers. Lord Macmillan's address to the inaugural meeting on "Toleration" has attracted world-wide attention. The Congress approached its business rather more seriously than on the previous occasion and many interesting discussions took place; such as that on the rule *Nulla poena sine lege* and on a resolution which called for a more developed and intensive study by the Congress of the problem of the nature and functions of comparative law. The debate on the first-mentioned topic produced a clash of ideologies which was of great interest to the English common lawyers who were present. The question of the establishment of an international school of comparative law was also keenly debated but was postponed for further consideration. There were other features of interest, which limitations of space forbid us to mention in detail, such as the inclusion of ecclesiastical and oriental law in the programme. The danger of gatherings of this nature lies in the possibility that the discussions may easily degenerate into much loose talk and the passing of futile resolutions. But this peril has been avoided and it is clear that the Congress serves a very useful purpose both as a meeting-ground for lawyers of all nations and as a centre on which to focus the many varying concepts of the nature and functions of comparative law.

H. C. G.

THE CONVENTION FOR THE PREVENTION AND PUNISHMENT OF TERRORISM

This Convention[1] was signed at Geneva on November 16, 1937, by the representatives of twenty states or Members of the League—Albania, Argentina, Belgium, Bulgaria, Dominican Republic, Egypt, Ecuador, Spain, Estonia, France, Greece, India, Norway, the Netherlands, Peru, Roumania, Czechoslovakia, Turkey, Venezuela, and Yugoslavia, the signatures for Albania, Belgium, and Norway being "*ad referendum*". Thus, with the exception of India, no member of the British Commonwealth of Nations was a signatory. Monaco has signed subsequently.

The Convention was based on the final text drafted by the Expert Committee which had been studying the question since its appearance on the programme of the League of Nations as a result of the assassination of the King of Yugoslavia and M. Barthou in Marseilles in the autumn of 1935—a text which, in its earlier form, had been the subject of thorough discussion and criticism by the First Committee of the Assembly in 1936. The main provisions of the Convention were:

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[1] League of Nations Publications, Series V, Questions Juridiques, 1937, V. 10. C. 546, M. 383, 1937, V.

(1) An engagement to treat as criminal offences "acts of terrorism" committed on the territory of one High Contracting Party and directed against another; i.e. acts of terrorism "of an international character", of which the crime of Marseilles was an example. (The expression "acts of terrorism" was defined as "criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or groups of persons or the general public".)

(2) A similar engagement to treat as criminal any conspiracy, incitement, participation or assistance made or given in the territory of one state for an act of terrorism directed against another state and to be committed abroad.

(3) A provision for extradition in the case of offences within the scope of the convention.

(4) Provisions for stiffening municipal law as to passports, firearms, and explosives.

(5) A provision for police co-operation.

Of these engagements it may be said: as to (1) that there can be few, if any, civilized countries in which legislation of the type provided for is not in force; as to (2) that legislation under this head is not to be found in all countries, notably not (according to what is apparently "the better opinion") in the United Kingdom; as to (3) that as the obligation to grant extradition for acts of terrorism or conspiracies, &c., was to be subject to the existing law and practice of each country, it was left open to any country to class an act of terrorism as a political crime and therefore not extraditable, and the existing law which in many countries prohibits the extradition of nationals was not affected; thus the suspicion that the convention abolished or prejudiced the right of asylum had no foundation in fact; as to (4) that these provisions were useful but not of major importance; as to (5) that this co-operation of police forces is already, to a large extent, effective without the existence of any international treaty obligation, and has been, is, and will be, of great value. Indeed, it may be surmised that for the prevention of terrorist outrages such co-operation is likely to be far more effective than the stiffening of the law for the infliction of punishment, usually after the event, on men and women of a fanatical temper.

The abstention of the United Kingdom was not the result of any lack of sympathy with the objects of the convention, but was rather due to an anticipation of the difficulty of framing the relevant domestic legislation. British criminal law differs in many ways from continental codes, and it would not be easy to give simple and accurate effect to obligations making penal incitement to the commission of terrorist acts abroad and instituting certain new offences as to explosives.

The separate action taken by India in relation to the Convention is worthy of remark. It is believed that this is the first occasion on which India has signed at Geneva a multilateral diplomatic convention to which no other member of the British Commonwealth is becoming a party. India has her own special terrorist problem; it was thus natural that her attitude should not be the same as that of the other members of the British Commonwealth. Her separate membership of the League enabled her to give appropriate effect to her own policy. From the Indian point of view it is to be observed with regret that the French signature of the Convention was expressly declared to have no effect as to French colonial possessions, and in particular as to Pondicherry and Chandernagore.

THE CONVENTION FOR THE CREATION OF AN INTERNATIONAL CRIMINAL COURT

This Convention[1] was also signed at Geneva on November 16, 1937, at the same Diplomatic Conference as the Terrorism Convention; indeed it was in the nature almost of an appendix or supplement to that convention, having been prepared by the same committee of experts, being open to signature solely by the signatories of the principal instrument, and taking effect only if and when that instrument is effective; further, the court which this convention creates is to have jurisdiction only for the acts of terrorism dealt with in the principal convention. The signatory states are now eleven in number: Belgium (*ad referendum*), Bulgaria, Spain, France, Greece, the Netherlands, Roumania, Czechoslovakia, Turkey, Yugoslavia, and Monaco who signed after the termination of the Conference. The convention is not to go into operation until it has been ratified or acceded to by at least seven states.

The court instituted by the convention is to consist of five regular and five deputy judges to be chosen by the members of the Permanent Court of International Justice at The Hague, and not, as was proposed in the text of the Expert Committee, by the members of the Council of the League. Indeed, except for the fact that the new court originates from a League Conference, there will be no connexion between it and the League. The jurisdiction of the court will be optional, in the sense that states parties to the convention will have the option to send to the court for trial persons accused of terrorist offences within the principal convention, instead of trying such persons in their own courts or extraditing them to another state, party to the principal convention; no state is bound to make use of the court, and no accused person can demand the right to be tried there. It is possible that in a moment of political embarrassment a government may find it convenient to make use of the court, if and when it is instituted.

The question what law the court is to apply seems to have given rise to considerable discussion; as nothing in the nature of an international criminal law, proper to such a court, is in existence, some municipal system had to be chosen. Ultimately it was decided that as between the municipal systems of the country where the terrorist act was done and the country which committed the accused for trial, "the substantive criminal law to be applied by the court shall be that which is the least severe" (Article 21); the court decides which law answers to that description. As it is possible that the court will not include any judge who is a national of the state whose law is to be applied, the convention provides for the invitation of an assessor "who is an acknowledged authority on such law". The convention does not apparently contemplate the presence of a jury, a jury being regarded, so it seems, as part of the law of procedure in a municipal system, and not (O shades and myths of Runnymede!) of its "substantive law" (*loi pénale de fond*).

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[1] League of Nations Publications, Series V, Questions Juridiques, 1937, V. 11. C. 547, M. 384, 1937, V.

It would thus seem that the restricted experiment instituted by this Convention is to be classified under the head of international criminal procedure rather than as a commencement of a substantive international criminal law.

PROCÈS-VERBAL SIGNED AT GENEVA IN JUNE 1936 WITH REGARD TO ARTICLE 5, PARAGRAPH 7, OF THE 1931 DRUGS CONVENTION

THIS Procès-verbal is of particular interest from the point of view of the development of international law.

The facts out of which it arose are quite simple. By the terms of Article 5, paragraph 7, of the 1931 Convention for limiting the manufacture and regulating the distribution of Narcotic Drugs, the Supervisory Body—an international organ set up by the convention—was required to issue its annual statement of the estimated world requirements of dangerous drugs *not later than* November 1 in each year. In practice, however, the date of November 1 was found to involve considerable difficulties for the Supervisory Body, and that organ suggested that its task would be greatly facilitated if the date were changed to December 1. The question then arose as to what procedure should be employed to introduce this amendment in the convention.

The convention contained a revision article (Article 33), but this would have meant a rather drawn-out procedure together with ratification of the amended instrument, and ratification would have involved unnecessary delay. It seemed somewhat absurd that the procedure should be applied to a change of a minor administrative nature, particularly as—and this is important—what would be modified was not obligations of contracting parties, but only the obligation of an international organ set up by the convention. Accordingly, an "equitable" spirit prevailed, and such steps were taken to carry out the change as would leave the letter of the law (Article 33 of the convention) unaffected, while modifying the too rigid consequences of the text of the convention. We have here an admirable illustration in the international sphere of Maitland's conception of equity as "*supplementary*" law.

The method adopted was that of a Procès-verbal in which the governments, parties to the 1931 Convention, recorded the fact that they were "not opposed to the postponement by the Supervisory Body until December 1 at the latest" of the annual statement in question, and in which it was expressly stated that:

> "This derogation is agreed to without affecting the right of each of the aforesaid governments to obtain, should it so desire, a reversion to the strict application of the Convention, the text of which remains unaltered."

Nothing could be more symptomatic of the spirit of international equity.

A further important point to notice is that the Procès-verbal was treated as an administrative arrangement and therefore opened *only to signature*,[1] and not to ratification or accession. Article 2 provided that the instrument was to come into force as soon as signature had been effected in the name of all governments parties to the 1931 Convention. At the date of writing, only one or two signatures are still wanting for this purpose. It was possible to employ signature only because: (i) the change was purely of a minor administrative character, (ii) it affected only the obligations of an international organ which had already expressed its consent to the change being made.

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[1] The Procès-verbal was actually adopted and signed in June 1936 by a conference of states parties to the convention, meeting concurrently with the 1936 Conference at Geneva on the Suppression of the Illicit Traffic in Dangerous Drugs.

J. G. Starke.

THE MATRIMONIAL CAUSES ACT, 1937, Sec. 13

One of the leading principles of private international law has been slightly modified by the Matrimonial Causes Act, 1937. The Englishwoman who is deserted by her foreign husband, after perhaps only a few days of married life, has long been the subject of judicial compassion, for the rule that the courts of the husband's domicil alone possess divorce jurisdiction may compel her to travel to the other end of the world in order to obtain relief. If, as sometimes happens, the husband procures the annulment of the marriage in his domicil, there is no hardship, for English law now recognizes that a decree of nullity granted by a court of the matrimonial domicil restores the woman to her status of celibacy.[1] Where the husband remains inactive, however, strict principle requires the wife to take divorce proceedings in the foreign domicil. It is true that at the beginning of this century there was a disposition to regard a wife who found herself in this position as retaining an English domicil of her own for the purposes of divorce jurisdiction,[2] but of recent years this departure from principle has been definitely and finally rejected.[3] The Act of 1937, however, alleviates the hardship, though not to any great extent. Section 13 provides that where a wife has been deserted by her husband or where her husband has been deported from the United Kingdom, and the husband was immediately before the desertion or deportation domiciled in England and Wales, the Court shall have jurisdiction for the purpose of any proceedings concerned with divorce, annulment of marriage, judicial separation, and restitution of conjugal rights. It will be observed that no attempt has been made to provide for the most usual and the most serious case of this type, i.e. where a man with a foreign domicil marries an Englishwoman while on a short visit to this country and then completely disappears. Indeed, it may be doubted whether the section will be of much practical use, for in the circumstances that it envisages—the possession of an English domicil immediately prior to the desertion—the domicil will be held to remain unchanged unless conclusive evidence to the contrary is adduced.

G. C. C.

ARTICLE 1 (3) OF THE COVENANT

Effect of Non-payment of Financial Contributions[4]

Article 1 (3) of the Covenant reads:

> "Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal."

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[1] *Salvesen* v. *The Administrator of Austrian Property*, [1927] A. C. 641; *De Massa* v. *De Massa*, *The Times* newspaper, March 31, 1931.

[2] *Bater* v. *Bater*, [1906] P. 209, 215–16; *Stathatos* v. *Stathatos*, [1913] P. 46; *Montaigu* v. *Montaigu*, [1913] P. 154.

[3] *H.* v. *H.*, [1928] P. 206; *Herd* v. *Herd*, [1936] P. 205.

[4] References the following League documents: A 1/5, 1937. A I/P. V. 6/1937. A I/P. V. 7/1937. A I/8/1937.

At the Eighteenth Ordinary Session of the Assembly the Fourth (Financial Committee) of the Assembly submitted to the First (Legal) Committee certain questions which were set out in the following letter:

"Sir,

I have the honour to inform you that the Fourth Committee, at its sixth meeting, on September 22nd, 1937, decided to submit to the First Committee the questions raised in the report of the Special Committee on Contributions (document A. 16. 1937. X) in connexion with the special cases of Honduras, Nicaragua, and Paraguay.

2. On September 28th, 1935, the Assembly sanctioned an arrangement for the cancellation of part of the debt of Honduras and the settlement of the balance in annual instalments spread over a period of twenty years. It was a condition of the arrangement that in the event of even a partial default on an instalment in the year in which it was due the arrangement should automatically be cancelled and the debt should become due in full.

On August 10th, 1936, Honduras gave notice of withdrawal from the League.

The question that arises is whether, under Article 1 of the Covenant, Honduras can be permitted to continue to pay instalments on consolidated contributions for seventeen years after leaving the League, or whether, in order to comply with the provisions of the Covenant, it must pay the full amount of consolidated contributions before its notice of withdrawal becomes effective (see page 4 of the report, paragraph 2).

3. Nicaragua's notice of withdrawal was received on June 27th, 1936. In the report already quoted, the Special Committee on Contributions proposes (page 4, paragraph 3) an arrangement whereby part of Nicaragua's debt would be cancelled and the balance paid by annual instalments spread over a period of 20 years.

The questions that arise are:

(*a*) whether the Assembly can grant a reduction of debt to a state which has given notice of withdrawal;

(*b*) whether the withdrawal of such a state can become effective at the end of the period of two years although it has not then paid off its debt in full.

4. Paraguay's notice of withdrawal was received on February 25th, 1935.

On September 28th, 1935, the Assembly adopted a report containing the following passage:

> '13, *Paraguay*. The Government of Paraguay has given notice of withdrawal from the League. Before withdrawal, it will be required, in accordance with Article 1 of the Covenant, to fulfil all its financial obligations to the League up to the actual date of withdrawal. . . .' (Document A. 15. 1936. X, page 7).

Paraguay's debt amounts to 271,298.72 gold francs for the years 1920–22, 1927, and 1929–37 (to February 24). In this connexion, the Special Committee on Contributions raises the following questions:

> 'The Committee, considering that the case of Paraguay presents certain features requiring the careful consideration of the Assembly, suggests that it would be desirable for the Assembly to examine the question whether, having regard to the terms of Article 1, paragraph 3, of the Covenant, the withdrawal of a state from the League can take effect at the end of the prescribed period of two years' notice if the state has not paid the contributions, including arrears due down to that date, or whether the state continues to belong to the League and incur liability for additional contributions until it regularizes its financial position.'

5. I would add that whatever decisions may be reached in regard to the three states mentioned above will also have the effect of settling the position of Guatemala and Salvador, whose notices of withdrawal were received on May 26th, 1936, and August 10th, 1937, respectively."

This letter raised two questions:

(*a*) Could the Assembly grant a reduction of its debt to a Member which had given notice of its intention to withdraw? The First Committee found no difficulty in answering this question in the affirmative. The Assembly had power to fix a Member's contribution. It therefore had power to reduce it retrospectively and allow deferred payments.

(*b*) Can a withdrawal by a Member become effective at the end of the period of two years even if at that date it had not paid off the whole of its debt? The Committee had no difficulty in answering that a Member's withdrawal became effective if it were not in default at the end of the two years under the arrangements for payment in force at that time, although the debt was still not paid in full. The cases therefore of Honduras and Nicaragua presented no difficulty.

The case of Paraguay was different. Her notice had expired in February 1937 and Paraguay had refused to make any arrangement with the League as regards the payments of arrears of contributions extending over the greater part of the period of Paraguayan membership. Since the obligation to pay financial contributions is clearly an obligation under the Covenant (it arises under Article 6 (5)) a literal application of the words of Article 1 (3) leads to the conclusion that Paraguay, notwithstanding her notice of withdrawal, still remains a Member liable to further contributions. The question was discussed in the First Committee and every speaker supported the view that Article 1 (3) could not be interpreted literally. It was pointed out that:

> "(*a*) The literal interpretation was contrary to common sense because it imposed an impossible condition. The terms of Article 1 (3) cover every conceivable type of international obligation and it is unlikely that any state, however well it conducted its affairs, could show at any particular moment that it had no international obligation of any kind which it had not fulfilled up to date.
>
> "(*b*) A literal interpretation would be contrary to the practice of the League in the past. The notices of withdrawal of Japan and Germany had expired at a time when it was public knowledge that they were in some respects in default under obligations under the Covenant or other international obligations respectively; yet the League had accepted the view that both these countries had ceased to be Members of the League.
>
> "(*c*) A literal interpretation was difficult to reconcile with other provisions of the Covenant because (i) Article 16 (4) provided that a state which had violated the Covenant of the League could be expelled, and it had been accepted in reports adopted by the Council or Assembly in the past that this provision could be applied in the case of a failure to pay financial contributions, though it was not recommended that it should be applied except in very special circumstances; it would be illogical to hold that because the League did not choose to use its right of expulsion, the Member should be compelled to remain a Member of the League: (ii) under Article 26 a Member can withdraw if an amendment to the Covenant is passed which it does not accept, and there is no provision making this withdrawal conditional on the fulfilment of all existing obligations.
>
> "(*d*) A literal interpretation was not in the interests of the League, since it involved maintaining formally the position that states remained Members of the League, entitled to its advantages as well as its obligations, indefinitely, when these states not merely refused to participate, but even denied their membership."

It was generally agreed that the meaning which the framers of the Covenant must be presumed to have intended, though they did not accurately express it, was that upon the expiry of the notice of withdrawal, the retiring Member still remained bound by all obligations under the Covenant or otherwise which had accrued up to date.

Various means of avoiding the literal interpretation were suggested, including (*a*) the radical one of frankly admitting that the provision did not mean what it said but something different; (*b*) interpreting the proviso not as being a condition for the validity of the notice of withdrawal, but as laying down something which should be done before this notice took effect, the omission to do which, however, would not invalidate the notice; (*c*) interpreting the proviso not as meaning that the defaulting Member *must* under the Covenant remain a Member of the League, but as giving the League a right to retain it if it wished—a right which the League would be deemed to have waived if it did not expressly exercise it by action taken in the Council or the Assembly within a reasonable time after the two years expired.

The question was then referred to a sub-committee whose draft reply to the First Committee was as follows:

> "*The case of Paraguay*
>
> 1. It is clearly the duty of a Member of the League to discharge all its financial obligations towards the League of Nations before its withdrawal becomes effective.
>
> 2. But Article 1, paragraph 3, of the Covenant does not oblige the League to treat as a Member a state which has resigned from the League but has not paid its debts to the League.
>
> 3. Accordingly, without seeking to give an authoritative interpretation applicable in all cases, the First Committee is of opinion, in view of the facts of the particular case, that Paraguay may be considered to have ceased to be a Member of the League of Nations, notwithstanding its undoubted default as regards its financial obligations towards the League.
>
> 4. Paraguay will, however, remain liable to discharge the full amount of its debt, as well as to discharge all its other obligations towards the League of Nations. The League is free to recover the amount due to it by all the means at its disposal."

The sub-committee prudently avoided explaining whether it had arrived at its conclusion on the basis of (*a*), (*b*), or (*c*) above.

When the sub-committee's draft came before the full committee, the Bolivian representative stated that he could not accept the conclusions in the draft letter as regards Paraguay, because Bolivia would regard Paraguay as a Member of the League as long as the dispute with Bolivia remained *sub judice*. It was still pending before a Mediation Committee at Buenos Aires, which was an emanation of the League of Nations. If the committee sent a reply to the Fourth Committee in these terms, he would feel obliged to oppose the report vigorously. The committee did not think it advisable in the circumstances to include in their reply to the Fourth Committee the answer as regards Paraguay proposed by the sub-committee. Proposals for reference of the question to the Permanent Court of International Justice were made and opposed. Finally, in view of the fact that it seemed impossible to reach an agreed solution before the end of the Assembly, it was decided that the First Committee should simply reply to the Fourth Committee that it did not deem it opportune to answer the question which it had been asked. Though unanimous agreement was not reached on the answer to be returned, the fact that a purely literal interpretation of Article 1 (3) found no defenders, is of some interest.

E.

THE POWERS OF THE ASSEMBLY UNDER ARTICLE 3 (3) OF THE COVENANT

In the debates which preceded the adoption by the Assembly in October last of the reports of its Far East Advisory Committee, the Delegate of Poland, M. Komarnicki, raised a question of the extent of the powers of the Assembly under Article 3 (3) of the Covenant, under which the committee had been set up. He doubted whether that article authorized the Assembly "to contemplate action in respect of an international conflict independently of other articles of the Covenant. So far as I am aware, this is the first time in the history of the League of Nations that this has been proposed. Can Article 3 be substituted for other articles which determine in a definite way the competence of the Council or Assembly and the relevant procedure?" The objection does not seem to have been further referred to in the discussion, and, as the Assembly proceeded to adopt the reports (Poland and Siam abstaining), it may be assumed that the other Members took the view, which was indeed expressly asserted in the second of the reports, that the Article "places no limit upon the action of the Assembly". It is believed that this interpretation is justified by the history of the paragraph, by the natural meaning of its words, and by the previous practice of the League.

(1) The Minutes of the Committee on the League of Nations at the Peace Conference make it reasonably certain that the paragraph was at least intended to be perfectly general.[1] At the session of March 22, 1919 M. Hymans proposed that Art. 3 should distinguish between the functions of the Assembly and of the Council; this was opposed by Lord Robert Cecil on the ground that the spirit of the Covenant was to avoid too sharp distinctions, and that it was preferable to leave the working out of convenient rules to the bodies concerned; and by President Wilson, who thought that no matter affecting the peace of the world should be excluded from the competence of the Assembly, and that, though the Council might be better fitted for action, the Assembly must have liberty of discussion. M. Hymans accepted these arguments and withdrew his amendment.

(2) This of course is not decisive of the interpretation which ought now to be put on the paragraph, but it is submitted that the most reasonable interpretation of the words used leads to the same result. In the first place the words of the paragraph itself are perfectly general—"the Assembly may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world". If an exception is to be read by implication into words apparently so unambiguous, some very cogent reason is surely called for. Secondly, it is noteworthy that Article 4 (4), defining the functions of the Council, uses precisely the same form of words as Article 3 (3). So exact a parallelism surely negatives any idea that we must be astute to avoid a construction of the Covenant which involves an overlap in the functions of the two bodies; it suggests rather that we should approach the matter with a bias in favour of concurrent functions. Thirdly, it is difficult to see anything in the later articles of the Covenant which makes it at all necessary to cut down the generality of the provisions of Article 3 (3). M. Komarnicki seems to have suggested that the use which it was proposed to make of the article might "superimpose on the duties of the Members of the League obligations hitherto unknown and of an indefinite extent". It is difficult to understand this fear, for neither the Assembly nor the Council can, except under a few well-defined provisions, impose an obligation on a Member of the League to take action unless its delegate has consented thereto. Certainly no obligation can be imposed under Article 3 (3), which merely gives power to "deal with" matters of the kind referred to,[2] and nothing that the Assembly could do

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[1] See Miller, *Drafting of the Covenant*, Vol. II, p. 338. The French minutes, at p. 503, are fuller on this point.

[2] The French text is "L'Assemblée connaît de toute question qui rentre dans la sphère d'activité de la Société ou qui affecte la paix du monde".

under the article would by itself impose a duty on the Member state. It does not seem possible to put the case against giving the paragraph its natural meaning higher than to say that if we accept this view we admit a certain *inelegantia* in the drafting of the Covenant. But no ingenuity can save the Covenant from that criticism. For example, the first of the two reports adopted by the Assembly contained a statement of the facts of the Sino-Japanese dispute such as might well have been made by the Council under the specific provisions of Article 15 (4); and the second, which recommended *inter alia* that Members of the League who were parties to the Nine-Power Treaty should consult together, and that Members of the League should refrain from any action tending to weaken China's power of resistance, might appropriately have been made by the Council advising on the means of fulfilling the obligations of Article 10 in a case of aggression. Fourthly, the case for the interpretation here maintained is even stronger if, as is submitted, a severely legalistic interpretation of this or any other article of the Covenant is out of place. Sir John Fischer Williams has well said that "a lawyer must walk delicately when he applies himself to the interpretation of the Covenant. . . . [He] may succeed in disentangling a plain man's meaning from a not very plain utterance, but the test of his success is not so much the approval of other lawyers as the satisfaction of the generality of plain men."[1]

(3) The practice of the League, so far as it affords any relevant precedents, seems to show that Article 3 (3) has not hitherto been regarded as subject to any implied limitations. Thus Article 8, which gives to the Council the function of formulating plans for the reduction of armaments, has not precluded the Assembly from "dealing with" the same matter under Article 3 (3); nor has Article 22 prevented it from discussing mandatory questions.[2]

APPLICATION OF THE RENVOI BY PALESTINE COURTS

An interesting decision has been given by the Court of Appeal in Palestine with regard to the capacity of an English Protestant domiciled in the country to dispose by will of movable and immovable property in Palestine.[3] The decision involves the application of the Renvoi doctrine in matters of personal status of foreign subjects living in Oriental countries, where such matters are governed by the national law of the foreigner. The Court relied on the much discussed decisions of the English courts adopting the doctrine: *In re Ross*, [1930] 1 Chancery 1937, and *In re Askew*, [1932] 2 Chancery 959. The case concerned the will of an Englishwoman who lived in Palestine many years and died there, having made a will by which she disposed of all her property in the country to an association. She left three infant grandchildren; and their guardian, the plaintiff in the action, contested probate of the will on the ground that the old, pre-war Ottoman law, as the law of the domicil, governed her succession, and according to it she could dispose only of one-third of her movable property and of such immovable property as was of the Mulk category. The deceased woman was a Protestant; and the Protestant community was not one of those which, under the Palestine Order-in-Council, possessed jurisdiction in matters of personal status of the members of the community. Accordingly, the succession was governed by provisions in the Palestine Order-in-Council 1922, and the Succession

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[1] *Some Aspects of the Covenant*, pp. 9 and 33. But the whole of Ch. I is in point.

[2] See references in Ray, *Commentaire du Pacte de la S.D.N.*, pp. 323, 628.

[3] *Baldwin* v. *Vesta.* Reported in the *Palestine Post* newspaper, Jan. 6, 9, and 11, 1938.

Ordinance of the Government. The Order-in-Council laid down the general principle that matters of personal status concerning foreigners are governed by the law of the nationality of the foreigner concerned, unless that law imports the law of his domicil, in which case it shall be applied. The Succession Ordinance, 1923, amplified the general provision as follows:

> "(*a*) Where the deceased was a foreigner, Mulk land and movables shall be distributed in accordance with the national law of the deceased;
>
> "(*b*) The validity in form of any will left by the deceased, and his capacity to make the testamentary disposition, shall be determined in accordance with his national law;
>
> "(*c*) Where the national law imports the law of his domicil . . . or the law of the situation of an immovable, the law so imported shall be applied; provided that, if the law of the domicil contains no rules applicable to the person concerned, the law to be applied shall be his national law."

The Palestine law contains, as it were, a statutory application of the principle of the Renvoi. In this particular case there was a reference back from the English national law to the law of the domicil for the movable property, and to the *lex situs*, which was also the law of Palestine, for the immovable. The essential question was whether the "law of Palestine" limited the capacity of the British subject domiciled in the country to dispose of his property by will. It was not contested that the Ottoman law in force in Palestine in November 1914, which is the basic law in Palestine, restricted the testamentary capacity for an Ottoman subject to a third of his property. But the Court was satisfied that by the Ottoman law, as applied prior to the British occupation of Palestine, a foreign subject was entitled to dispose by will of all his movable property and of his immovable property of the Mulk category, without limitation. Although the prescription was that he could dispose of the immovables "so far as permitted by the law", that law was interpreted by the Ottoman decisions in the case of a foreigner to mean his national law, because the immovable property was regarded as if it was situate in the country of the *de cujus*. The Palestine Court in the present case followed these decisions, and held that the testamentary capacity was governed by the English law, so that the will was good, except in respect of certain immovable property of the *Miri* tenure, which by Palestine law cannot be devised. The Court accepted the double Renvoi back from the law of the domicil, and the law of the *situs*, to the English municipal law.

The judgment of the Palestine court follows earlier decisions in cases of succession in the special conditions of ex-territorial jurisdiction in Eastern countries. Thus, in the case of *In re Baines* (1903)[1] it was held by the High Court in England, and in the case of *In re Dale* (1910) it was held by the British Consular Court in Egypt, that the immovable property of an Englishman in Egypt should be disposed of according to the terms of the will, although the disposition would not have been valid according to the Egyptian law. One seeming exception to the practice of applying the English municipal law as to capacity to dispose by will proves the rule. In the case of *Bartlett* v. *Bartlett*, [1925] A.C. 377 where a Moslem British subject domiciled in Egypt by a will executed in English form left all his property, movable and immovable, to his widow and children, and his mother claimed a sixth share of the estate in accordance with the Moslem law of inheritance, it was held by the Judicial Committee of the Privy Council that the testator had no capacity to dispose of the share of his estate to which the mother was entitled by law. That case, however, turned on the provision in the Ottoman Order-in-Council, then applicable to Egypt, to the effect that in all matters relating to inheritance the Court shall, in the case of persons belonging to non-Christian communities, recognize and apply the religious law and custom of the person concerned. The English law, as laid down by the Order-in-Council, directly imported the Moslem law of inheritance where the *de cujus* was a Moslem; and so there was a Renvoi to the religious law which was accepted.

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[1] Unreported, but quoted in Westlake's *Private International Law*.

NORMAN BENTWICH.

CANADA AND THE LAW OF NATIONS

(*a*) *Neutrality*

WHILE this topic has received little publicity in Canada it is assuming increasing importance in the minds of informed students. The Canadian Government itself under the leadership of Mr. MacKenzie King has stressed, on every possible occasion, its desire to avoid foreign entanglements of any kind which may involve Canada in war. At the last session of Parliament two important pieces of legislation received the approval of Parliament without any opposition and without any particular public attention. They were the Canadian "Foreign Enlistment Act", 1 Geo. VI, c. 32, and an "Act to Amend the Custom Act", 1 Geo. VI, c. 24. The first is an improved "Imperial" Foreign Enlistment Act—improved in the sense that it is wider in its application and by section 19 (1) (*a*) states that the Governor-General in Council may apply "the provisions of the Act, with necessary modifications to any case in which there is a state of armed conflict, civil or other wise, either within a foreign country or between foreign countries". The second, the Customs Act, among other things, enables the Governor-General in Council to control the export of practically everything, and the import of arms, munitions, &c. Both of these have been applied in respect of Spain, but not in respect of Japan or China. In the session of Parliament which has just opened, the government has introduced legislation enabling it to control Canadian shipping and the goods carried on Canadian ships. In addition to these positive measures Mr. King has made it clear that he prefers a League of Nations without sanctions, and that he proposes to leave the decision as to participation in sanctions, or for that matter in war itself, to the Canadian Parliament. This raises a nice legal question. At the moment it has no political importance, but it is of academic interest. The question is: What is the *legal* status of Canada and Canadians in the event (which God forbid) of Great Britain or one of the other Dominions being involved in war? Does the act of His Majesty, acting on the advice of his responsible ministers in Great Britain or in Australia, in declaring the existence of a state of war, mean that all of his subjects thereby automatically become belligerents, with the legal rights and duties which attach to that status? If they do, then is there anything in the claims of Mr. King? For the moment, I do not propose to discuss such practical questions as the state of public opinion in Canada or the possible attitude of the enemy. I am concerned rather with the *situs* of the prerogative in respect of war. Is it in London? Is it in Ottawa? Or has it become a common possession of all the members of the Commonwealth and exercisable only upon their joint and unanimous advice? In this connexion I am not concerned with the so-called transference of the prerogative, or parts of it to the King's representatives, the

Governor-General or Lieutenant-Governors. I am concerned rather with the ministers who may properly advise His Majesty in respect of such matters as the declaration of war and the legal effect of His Majesty's actions when thus advised. In 1914 there was no question. His Majesty was advised by his responsible ministers in London, and as a result of His Majesty's actions all his subjects became belligerents. But is this true in 1938? There is no doubt that many in South Africa and the Irish Free State believe that as a result of their legislation this is no longer true in their case. It is clear that the prerogative may be limited or abolished entirely by appropriate legislation. But does Dominion legislation affect the prerogative in respect of war? That is a question which is still unanswered. In addition, it is clear that the prerogative may be affected by convention or agreement. In 1914 it was His Majesty's ministers in London who alone were competent to advise Him in respect of treaties. In 1938 it is His Majesty's ministers in Ottawa who advise him in respect of Canadian treaties. In 1926 it was the Parliament at Westminster which controlled "leave to appeal to His Majesty's Privy Council". In 1938 it is the Canadian Parliament which has this power. In 1921 it was His Majesty's ministers in London who advised His Majesty in respect of the appointment of His Majesty's representative, the Governor-General. In 1938 it is His Majesty's ministers in Ottawa who do this for Canada. All of which suggests that there is a case to be made for holding that His Majesty's ministers in London are no longer competent to advise His Majesty in respect of matters which may affect legal rights and obligations in Canada, without the prior consent of the Canadian Government. While, as suggested above, this is a question which, if it arises, will be settled by circumstances or incidents on which law has little bearing, it is one which is becoming of increasing importance in Canada and should be given careful study.

(*b*) *Canadian cases*

Only two cases dealing with points of international law have come before the Canadian courts recently.[1] In the first, *Maass* v. *Seelheim*,[2] the German Consul in Winnipeg was the defendant in a libel and slander action. His defence was that the alleged libel and slander occurred in the course of his official business and that because of his office he was privileged in respect of such matters. The court agreed, and dismissed the action. The other case, *Varin* v. *Cormier*,[3] was one in which a woman of French origin who claimed she had married a Canadian and who possessed a Canadian passport objected to deportation proceedings on the grounds that she was a Canadian. The court held that possession of a Canadian passport was not proof of Canadian nationality and, as she had not produced in court adequate proof that her husband was at the time of her marriage a Canadian, her objection was dismissed.

NORMAN MACKENZIE.

THE EFFECT OF THE SEPARATION OF BURMA FROM INDIA UPON OBLIGATIONS UNDER INTERNATIONAL LABOUR CONVENTIONS

AT the Twenty-third Session of the International Labour Conference Mr. F. W. Leggett, the British Government Delegate, made before the Resolutions Committee of the Conference a statement in the following terms relating to the effect of the separation of Burma from India upon the obligations existing in respect of Burma under international labour conventions:

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[1] The cases affecting the treaty power were discussed in Vol. XVIII (1937) of the *British Year Book of International Law*.

[2] [1936] 4 D.L.R. 267.

[3] [1937] 3 D.L.R. 588.

"*Statement made by Mr. Leggett, British Government Delegate, at the Fifth Sitting of the Resolutions Committee on* 15 *June* 1937.

1. Burma, as part of India, has up to date participated in such international labour conventions as India has ratified up to 1 April 1937.

2. As from 1 April 1937, as a result of the operation of the Government of India Act, Burma became separated from India. Henceforth, as the position of Burma in relation to international labour conventions is that Burma is an overseas territory of His Majesty with a status similar to that of Southern Rhodesia, she is, within the meaning of Article 421 of the Treaty of Versailles, fully self-governing.

3. Although it is agreed that Burma is bound to continue to observe and apply all the international labour conventions in which she previously participated as part of India, nevertheless her participation therein must henceforth be separated from that of India.

4. It is accordingly notified that (*a*) Burma will continue to observe the international labour conventions referred to in paragraph 1 above in accordance with their provisions, and (*b*) His Majesty's Government in the United Kingdom have the right to give notice of the termination of the application of any of those conventions to Burma separately in accordance with the provisions of the articles in such conventions providing for termination.

5. As regards the participation of Burma in the future activities of the International Labour Organisation, the Government of Burma and His Majesty's Government in the United Kingdom have agreed that such participation should be secured through the medium of His Majesty's Government in the United Kingdom, which will be empowered to accept on behalf of and with the consent of the Government of Burma the obligations of future international labour conventions."

Following upon Mr. Leggett's statement, the Resolutions Committee submitted the following resolution to the Conference, and it was adopted without opposition:

"Whereas Burma, which has hitherto enjoyed full membership of the International Labour Organisation as part of India, ceased to be a part of India on 1 April 1937;

"Whereas the Government Delegate of the United Kingdom has indicated the steps which the Governments of the United Kingdom and of Burma propose to take to ensure the continuation of effective Burmese collaboration with the Organisation;

"The Conference:

"(*a*) expresses its cordial appreciation of the statement made by the Government Delegate of the United Kingdom on behalf of the Government of Burma that Burma recognises that the international labour conventions ratified by India while Burma was part of India remain binding upon Burma and that Burma proposes to submit her annual report thereon through the Government of the United Kingdom;

"(*b*) invites the Governing Body to consider whether it is desirable that there should be included in future conventions some provision permitting accession thereto by fully self-governing colonies, protectorates and possessions which are not separate Members of the Organisation."[1]

It may perhaps be open to question whether the authors of the Constitution of the Organization would have accepted the view expressed in the British statement that a territory with the present status of Burma is, within the meaning of Article 35 of the Constitution of the International Labour Organization (Article 421 of the Treaty of Versailles), fully self-governing; but this does not affect the interest of the precedent as a recognition that the principle of state succession applies to multipartite treaties of a legislative character. The British statement says in terms that "it is agreed that Burma is bound to continue to observe and apply all the international labour conventions in which she previously participated as part of India", and the Conference in its resolution takes note that Burma "recognises that the international labour conventions ratified by India while Burma was part of India remain binding upon Burma". The Conference resolution, which was accepted by the Government of the United Kingdom, also makes it clear that the obligations which are inherited by Burma include the obligation to submit an annual report, which derives from the Constitution of the Organization, as well as the obligations resulting directly from the terms of the conventions ratified by India.

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[1] International Labour Office, *Official Bulletin*, Vol. XXII, No. 3, pp. 148–9.

C. W. JENKS.

SOME FURTHER REPRESENTATIONS UNDER ARTICLE 23 OF THE CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANIZATION

IN the course of its Seventy-seventh Session, held in Geneva in May 1937, the Governing Body of the International Labour Office decided to publish for purposes of record certain reports relating to two further representations[1] concerning the application of international labour conventions which had been made under Article 23 of the Constitution of the Organization. These reports, which were submitted to the Governing Body by committees of its members appointed by it to advise it concerning the representations in question, were adopted by the Governing Body unanimously.

The Madras Labour Union for Textile Workers Case. In this case it was alleged that the Government of India had failed to secure the effective observance of the Unemployment Convention, 1919, which it had ratified in 1921, in that it had failed to establish a system of free public employment exchanges as required by Article 2 of that Convention. Two reports upon this case by the Governing Body's committee have been published.

The first report concluded that the representation was receivable and proposed that the Government of India should be requested to supply further information on the position. The point of chief interest in this report is what is in substance a finding that certain correspondence which accompanied the ratification of the convention by India did not constitute ratification subject to a reservation.

Before the Government of India had supplied the further information requested by the Governing Body the International Labour Office received a communication from the Madras Labour Union for Textile Workers suggesting that further action upon the representation should be deferred until sufficient experience had been acquired of the actual working of the new Constitution which had come into operation in India in the interval. The Governing Body thereupon adopted a second report by its Committee which laid special emphasis upon two points of importance. The Committee made it clear that "since the proceedings upon a representation are at all times under the control of the Governing Body, it is for the Governing Body to decide whether they shall be suspended". It pointed out that in any case in which there was a question of a representation being withdrawn "it might be necessary for the Committee to enquire fully into all the circumstances in order to satisfy itself that no improper pressure had been applied in order to secure the withdrawal of the representation", but added that no question of that kind arose in a case in which the organization responsible for the representation merely requested the suspension of the proceedings. In the second place, while recommending that the Governing Body should suspend the proceedings on the understanding that such suspension would not imply their termination and would not preclude further consideration of the matter in the future, the Committee declared that it did not "wish its decision to be construed as implying that in its view the establishment of provincial autonomy in India . . . has any effect upon the legal obligations incumbent upon India under conventions which she has ratified". It was simply, the Committee explained, on account of practical considerations that it recommended the suspension of the proceedings in view of the recent introduction of provincial autonomy. The Committee thus affirmed, in respect of international labour conventions, the well-established principle of general international law that changes in the internal constitutional arrangements of a state have no effect upon that state's international obligations.

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[1] International Labour Office, *Official Bulletin*, Vol. XXII, No. 2, pp. 61–9. For the earlier case of the Madras and Southern Mahratta Railway Employees' Union see *ibid.*, Vol. XXI, No. 1, pp. 16–19, and this *Year Book*, Vol. XVIII, 1937, pp. 163–5.

The Labour Party of Mauritius Case. The main point in this case was whether the Labour Party of Mauritius, on behalf of which the representation was made by its President, Dr. J. M. Curé, could be regarded as an "industrial association of employers or workers" entitled to make a representation under Article 23 of the Constitution of the Organization. The representation stated that it was made on behalf of the Labour Party "in the absence of any industrial association in Mauritius", and thus appeared to admit that the Labour Party was not itself an industrial association. The Committee did not, however, consider that this disposed of the matter and reported that:

> "According to the Constitution, the right to make a representation belongs to an 'industrial association of employers or of workers', but there is no further definition of these terms. It is, therefore, for the Governing Body to examine in each individual case what the nature of the association making the representation in fact is, irrespective of its name which may be determined by local circumstances having no bearing on its real character. For example, in one country, the right of workers and employers to form industrial associations may be subject to restrictions, and trade unions in the true sense may exist under a name concealing their exact identity. In another country an industrial association may bear a name that would suggest that it is of the character of a political party. It is the duty of the Governing Body to determine in each case, independently of the terminology employed and of the name that may have been imposed on the association by circumstances or selected by it, whether the association from which the representation emanates is in fact an 'industrial association of employers or workers' in the natural meaning of the words. In particular, when considering whether a body is an industrial association, the Governing Body cannot be bound by any national definition of the term 'industrial association'. When an international convention uses a term so general as 'industrial association' for designating a class of persons who may initiate an international procedure or to whom such a procedure applies, there is no ground for holding that this term may be interpreted for the purposes of the convention otherwise than according to the meaning naturally belonging to it. Above all, it cannot be interpreted with reference to a particular state, according to the legislative or customary terminology of that state. See for instance the decision of the Permanent Court of International Justice in the *Exchange of Greek and Turkish*

Populations Case: Permanent Court of International Justice: *Collection of Advisory Opinions*, No. 10, pp. 19–21."

In the particular case before it, however, the Committee took the view that there was no evidence which would entitle it to declare that the Labour Party of Mauritius was in fact an industrial association within the meaning of the Constitution of the Organization. It therefore proposed that the representation should be declared irreceivable.

C. W. JENKS.

DECISIONS, OPINIONS, AND AWARDS OF INTERNATIONAL TRIBUNALS

JUDGMENTS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

JUDGMENT DELIVERED JUNE 28, 1937[1]

DIVERSION OF WATER FROM THE MEUSE

THIS was a case brought by the Netherlands against Belgium under the Optional Clause of the Court's Statute. The subject of the dispute was the question whether the execution by Belgium of various works in connexion with the construction of the Albert Canal and the manner in which, without the Netherlands' consent, Belgium supplied and apparently intended in future to supply with water existing or projected canals in the north of her territory, were consistent with the rights of the Netherlands under the treaty of May 12, 1863, relating to the waters of the Meuse. The points at issue depended entirely on the interpretation and application of the treaty, the purpose of which was, as stated in its preamble, "to settle permanently and definitely the régime governing diversions of water from the Meuse for the feeding of navigation canals and irrigation channels". No question of general international law was involved in the decision.

The Meuse is an international river. It rises in France, crosses Belgium, forms the frontier between the Netherlands and Belgium below Lixhe, and enters Netherlands territory a few miles above Maestricht. Between Borgharen (a few kilometres below Maestricht) and Wessem-Maasbracht it again forms the frontier between the two countries, and then below Wessem-Maasbracht both banks are in Netherlands territory.

Until it reaches Venlo, in the Netherlands, the course of the river is rapid and, in general, the river is shallow. It is a river which is fed by rainfall, and not by the melting of glaciers; consequently the flow of water varies greatly. In its natural condition the Meuse above Venlo is of no great assistance to navigation. Though for the most part it has been canalized, the most important function of the Meuse, at any rate in Belgium and in the Netherlands, is that of a reservoir for other waterways. On the other hand, the people of the territory through which the Meuse flows are accustomed to make use of water transport, and where canals have been constructed for this purpose they must in the main be supplied with water from the Meuse.

Prior to the treaty of 1863 both Belgium and the Netherlands had constructed various works fed by the waters of the Meuse, and difficulties had arisen between the two countries with regard to their interests in these waters. The treaty, which, as already indicated, was designed to settle all such questions, laid down in detail the nature of the works to be constructed on either side, the quantity of water that might be utilized, and the like. In course of time progress in the two countries led to the demand for new works. Attempts were made to agree upon these, but the negotiations were not successful. The

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[1] Series A/B, No. 70. The Court's publications can be obtained from the English agents: Allen & Unwin, Ltd., 40 Museum Street, London, W.C. 1.

Netherlands, therefore, proceeded to construct the Borgharen barrage, completed in 1929, and the Juliana Canal, opened to navigation in 1934. Belgium, on her side, replied by making the Albert Canal, which was begun in 1930 and is not yet finished.

The first Netherlands contention was that the construction by Belgium of works which render it possible for a canal situated below Maestricht to be supplied with water taken from the Meuse elsewhere than at that town is contrary to the treaty of 1863.

Article 1 of the treaty provides for the construction at Maestricht of a new intake which will constitute the feeding conduit for all canals situated below that town. The Netherlands argued that this meant that the Maestricht intake was to be the only feeder, so far as Belgium was concerned, for canals below, but she did not accept the same interpretation as applying to canals in Netherlands territory below Maestricht. Her view was that the treaty, by making the Maestricht feeder, in Netherlands territory, the only source of supply, gave the Netherlands a right of control which debarred Belgium from constructing a canal fed from anywhere else on the Meuse, but that the Netherlands herself was free to construct canals below Maestricht fed from other sources.

The Court rejected this Netherlands contention, holding that the treaty could not in the absence of express terms be construed as placing the contracting parties in a position of inequality. Article 1 was equally binding on both parties and did not operate as an absolute prohibition to construct any canal below Maestricht fed from a source other than the Maestricht feeder.

The second Netherlands contention was that the feeding of certain parts of the Belgian canal through the Neerhaeren Lock with water taken from the Meuse elsewhere than at Maestricht was contrary to the treaty. On this point the Court held that a lock is not in itself a feeder. It was only if the use of the Neerhaeren Lock contravened the object of the treaty by producing an excessive current or a deficiency of water in the Meuse that the Belgian action would be wrongful. But there was no evidence that this was the case.

The third Netherlands contention was that when the Albert Canal was brought into operation that part of it which comprised the old Hasselt Canal would be fed with water taken from the Meuse elsewhere than at the treaty feeder (Maestricht), and that this would be contrary to the treaty. The Court held that there was nothing in the text of the treaty to prevent either the Netherlands or Belgium from making such use as they think fit of canals covered by the treaty which are wholly in their own territory. As regards such canals each state is at liberty to modify, enlarge, or transform them and even to increase the volume of water in them from new sources, provided that the diversion of water at the treaty feeder and the volume of water to be discharged therefrom is not affected.

Belgium made a counter-claim alleging (1) that the Netherlands had committed a breach of the treaty of 1863 by constructing the Borgharen barrage on the Meuse below Maestricht, and (2) that the Juliana Canal is subject, as regards its water-supply, to the same treaty.

As to (1) the construction of the Borgharen barrage, which raises the level of the Meuse above it, results in the volume of water discharged by the treaty feeder being always the maximum volume. Belgium did not suggest that such volume was in excess of the maximum fixed by the treaty. Her complaint was that the situation had been altered without her consent. The Court, however, observed that so long as neither the discharge of water through the feeder, nor the volume which it supplies, nor the current is adversely affected, there is nothing in the treaty to prevent the Netherlands from altering the depth of water in the Meuse at Maestricht.

As to (2) the Court held that the Juliana Canal, although geographically below Maestricht, was not, as Belgium contended, a canal below Maestricht within the meaning of Article 1 of the treaty. That article read with Article 4 necessarily implies that the feeder and consequently the canals which it has to feed are on the left bank of the river. The Juliana Canal, which runs along the right bank, cannot therefore be treated as coming within Article 1.

In the result, the Court rejected the Netherlands claim and the Belgian counter-claim, by a majority of ten to three in each case.

JUDGMENT DELIVERED OCTOBER 8, 1937[1]

LIGHTHOUSES IN CRETE AND SAMOS

THIS case, which was submitted to the Court by a special agreement between the French and Greek Governments, was a sequel to the *Lighthouses* case between the same parties decided by the Court in 1934.[2] In that case the Court had held that the contract of April 1913 between the French firm known as "Administration générale des Phares de l'Empire ottoman" and the Ottoman Government extending until September 1949 the concession granted to the firm was duly entered into and was accordingly operative as regards the Greek Government in so far as concerns lighthouses situated in the territories assigned to Greece after the Balkan wars or subsequently. The Court had, however, confined its decision to the question of principle and expressly refrained from specifying which were the territories detached from Turkey and assigned to Greece where the lighthouses governed by the contract are situated, this point not having been argued in that case. The object of the present proceedings was to obtain the Court's decision as to whether lighthouses situated in Crete (including the adjacent islets) and Samos were governed by the contract.

The special agreement stated that the difference between the two governments related to the applicability of the principle laid down in the previous judgment and the Court dealt with the case on this footing, observing that the question of principle, namely, that the contract of April 1913 was duly entered into, was *res judicata* and could not be reopened. The point at issue was simply whether Crete and Samos are included amongst the territories to which the Court's previous decision applies and whether, consequently, the contract was duly entered into in so far as concerns them.

Article 9 of Protocol XII signed at the Lausanne Conference of 1923 provides that a state succeeding to Turkish territory is subrogated to Turkey in territories "detached from Turkey" after the Balkan wars so far as regards concessionary contracts entered into with the Ottoman Government before the coming into force of the treaty providing for the transfer, and the article adds that this subrogation will have effect as from the coming into force of the treaty by which the transfer of territory is effected.

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[1] Series A/B, No. 71.

[2] Series A/B, No. 62, reported in the *Year Book* for 1935, p. 186.

The Greek Government argued that Crete and Samos, which enjoyed a wide autonomy under the Ottoman Empire, were not "detached from Turkey" after the Balkan war because at that time Turkey had long since lost her sovereignty in regard to them. It followed, according to this argument, that in April 1913 the Ottoman Government no longer had any capacity or competence to conclude the contract in question and accordingly the contract, though valid in itself, was not duly entered into in respect of those territories.

The Court, in rejecting this view, pointed out that Article 9 of the Lausanne Protocol is perfectly general; it makes no exception or reservation relating to territories which possessed a special status under the Ottoman Empire. Neither Crete nor Samos had in April 1913 ceased to be part of the Ottoman Empire. Turkey only renounced her sovereignty by the Treaty of Athens of November 1913. It followed, in the Court's opinion, that the territories in question were only "detached from Turkey" under that treaty, which also assigned them to Greece.

The Court therefore held that the lighthouses in Crete and Samos fell within the scope of the decision given in 1934.

The judgment was given by a majority of ten to three.

JUDGMENT DELIVERED NOVEMBER 6, 1937[1]

THE BORCHGRAVE CASE

DURING the later months of 1936 Baron Jacques de Borchgrave, a Belgian national resident in Madrid, collaborated in the work of the Belgian Embassy in Madrid. He left the Embassy by motor-car on December 20, 1936, and never returned. On the same day, his disappearance was notified by the Embassy to the Spanish civil and military authorities. A body found on the route from Madrid to Fuencarral on December 22, five kilometres from Madrid, was later identified as the body of Baron Jacques de Borchgrave. Some days thereafter, the motor-car in which he had left the Embassy was retrieved in Madrid.

By a special agreement concluded on February 20, 1937, the Belgian and Spanish Governments asked the Court to decide whether, having regard to the circumstances of fact and law concerning the case, the death of Baron Jacques de Borchgrave involved the responsibility of the Spanish Government.

In their Memorial filed with the Court the Belgian Government submitted: (1) that the responsibility of the Spanish Government was involved on account of the crime committed on the person of the Baron; (2) that the Spanish Government was responsible for not having used sufficient diligence in the apprehension and prosecution of the guilty.

To these submissions the Spanish Government took preliminary objections. They said (1) that the Court had no jurisdiction to entertain the second submission, and (2) that neither the first nor the second submission could be entertained because the remedies afforded by Spanish municipal law had not been exhausted. In accordance with its usual practice the Court held special sittings to deal with the preliminary objections, and the present report relates only to them.

The Spanish Government based its first objection on the ground that the Belgian Memorial related to two different responsibilities: the one for the death of the Baron, the other for lack of diligence in apprehending and prosecuting the guilty. The Spanish Government contended that the special agreement ought to be strictly interpreted and that, thus interpreted, it refers only to the first point. The Belgian Government, on the other hand, contended that their two submissions related not to two distinct responsibilities but to two different reasons for the responsibility of the Spanish Government, and that the very general provisions of the special agreement included the question of responsibility both for the death of the victim and for a lack of diligence in apprehending and punishing the guilty.

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[1] Series A/B, No. 72.

The Court, observing that the issue thus raised depended upon the interpretation of the special agreement, pointed out that its terms were quite unlimited and entirely free from qualifying expressions. Reference was made in the preamble to a controversy apropos of the death of Baron de Borchgrave, and Article 1 speaks simply of "the case". This being so it was necessary to determine what were the contentions advanced by the two governments in the diplomatic correspondence preceding the signature of the special agreement, and this showed conclusively that the controversy which it was agreed to submit to the Court related to the general question of the legal responsibility of the Spanish Government in connexion both with the fact of Baron de Borchgrave's death and with the measures taken after the death for the apprehension and punishment of the guilty. The Court therefore had jurisdiction to examine the second Belgian submission.

In the course of the oral proceedings the Spanish Government agent withdrew the second preliminary objection as such and asked that the point as to the non-exhaustion of local remedies should be dealt with in the proceedings on the merits.

The decision of the Court was unanimous.

Alexander P. Fachiri.

DECISIONS OF NATIONAL TRIBUNALS INVOLVING POINTS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

Decisions of the English Courts During the Year 1937[1]

The Italian annexation of Ethiopia and the civil war in Spain have both led to some interesting decisions by the English courts involving points of international law.

There are two cases arising out of the former, of which the Bank of Ethiopia case will be taken first. A digest of this case is given, followed by some comments.

Case No. 1. Bank of Ethiopia v. *National Bank of Egypt.* [1937] 1 Ch. 513.

The Bank of Ethiopia was formed in 1931 as a company under Ethiopian law with its principal office at Addis Ababa. The Government of Ethiopia held six-tenths of its capital and appointed six out of the ten directors. The Bank had financial relations with the Bank of Egypt. As a result of the war with Italy the Emperor, Haile Selassie, left the country on May 2, 1936, and came to England, and on May 9, the annexation of the country by Italy was proclaimed after the Italian occupation of Addis Ababa. Since that date, though he still claimed to be the sovereign and the government of the country, neither the Emperor nor any other persons acting on his behalf had exercised any effective control over any part of Ethiopia, and, though resistance was continued by Ethiopian chiefs and guerrilla forces in some parts, the Italian Government effectively controlled the capital and the greater part of the country. By May 8 all the branches of the Bank of Ethiopia were closed by the Italians except an agency at Gore which was closed in September, and the head office was placed under Italian supervision.

On June 20, 1936, an Italian decree was issued purporting to dissolve the Bank and appointing L. liquidator.

On September 20, 1936, the persons, who had been the directors of the Bank under Ethiopian law, without the approval of L., brought this action in the name of the Bank against the Bank of Egypt claiming a settlement of accounts. The defendant Bank raised the question whether in the circumstances the persons who brought this action or the Italian liquidator had the right to claim the settlement of accounts, and this question was tried as a preliminary issue. As stated in a certificate from the Foreign Office put before the court, the Government of the United Kingdom in December, 1936, recognized the Italian Government as being in fact (*de facto*) the Government of the area in Ethiopia then under Italian control, although still maintaining diplomatic relations with the Emperor as *de jure* sovereign through the Ethiopian Legation in London. On April 28, 1937, the day before the trial of the issue, the Emperor signed in England a decree purporting to authorize all Ethiopian companies to hold meetings and carry on business outside Ethiopia.

It was argued for the plaintiff Bank that in the circumstances the Italian authority in Ethiopia must be regarded by the English courts as that of a power in military occupation of enemy territory in time of war, and consequently Italian legislation in Ethiopia should be recognized as valid only in so far as it came within the limits of the competence of such a power under international law, which extended only to such measures as were necessary for the safety of the Italian forces and preservation of law and order; and therefore did not include the dissolution of local companies or the transfer of their property. The Italian decree with regard to the Bank could not be recognized as valid in England unless it could be proved that Italian law was now the law of Ethiopia.

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[1] In general, all cases reported in the English Law Reports for 1937, and in contemporary reports covering the same period, are reviewed in this number of the *Year Book* (unless they have already been dealt with in the previous number), together with any cases in the reports for 1938 which have appeared at the time of writing, March 1938.

It was argued for the defendant Bank that the legislation of the government, *de facto* in control of the country and recognized as such by the Government of the United Kingdom, must be recognized by the English courts as the law of the country.

Held by Clauson J.:

(1) (following decisions given after the recognition of the Soviet Government as the *de facto* Government of Russia: *Luther* v. *Sagor*, [1921] 3. K.B. 532: and *White Child and Beney & Co.* v. *Eagle Star Co.*, 127 L.T. 571) that upon the recognition by the Government of the United Kingdom of the Italian Government as the *de facto* government of those parts of Ethiopia which it controlled, the court must treat the acts and legislation of the Italian Government in Ethiopia as the acts of the government and the law of those parts of Ethiopia and must accord to them the respect due to acts of a foreign sovereign state in its own territory. After this recognition, the court could not regard the Italian authorities in Ethiopia as having only the status of a power in military occupation of a part of the territory of an enemy state.[1]

(2) That this principle applies to all such acts or legislation done or enacted after the Italian Government had in fact become the government of the country even if the Government of the United Kingdom had not then recognized it as such.

(3) That the application of this principle was not affected by the fact that the Emperor of Ethiopia was still recognized by the Government of the United Kingdom as the *de jure* sovereign of the country. This recognition of the Emperor *de jure* simultaneously with the recognition of the Italian Government *de facto* could only mean that H.M.G. recognized that the Emperor had the right (not enforceable at the moment) to recover the governmental control of which he had in fact been deprived.

(4) That as from May 9, 1936, the Italian Government had effectively assumed governmental control of all those parts of Ethiopia in which the Bank operated except Gore, and after September of Gore also.

(5) The effect of the Italian decree in Italian law was to dissolve the Bank, save in so far as it had to be kept in existence for the purposes of liquidation, and to deprive the directors of all control over its affairs, which were vested in the liquidator, and it must be recognized as the law of all parts of Ethiopia where the Bank operated and therefore as transferring from the persons who had instituted this action to the Italian liquidator the right to sue in the name of the Bank of Ethiopia.

The English courts take the view that under international law, the acts and legislation of the government, which *in fact* exercises effective administration over foreign territory, must be accorded the recognition and respect due to the acts and laws of a foreign sovereign done in, or enacted with regard to, his own territory. They act upon the official statements of His Majesty's Government to determine whether the government in question does exercise effective administration, and regard it as immaterial whether or not this government had lawfully or unlawfully established its administration over the territory.

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[1] Clauson J. appears to have relied upon the fact that there was no other government in any part of Ethiopia than the *de facto* Italian Government to reject the argument that the Italian Government should only be regarded as in military occupation of enemy territory: but it is submitted that this is the wrong reason for the right conclusion. There was (except in a few square miles) no government in Belgium except the German Government from 1915 to 1918, but the German Government was during these years only in "military occupation". The test is whether the war is over or not, and for the court whether the government have recognized that it is over.

There are five types of cases in which the question of the application of this principle may arise:

(1) Where in an already existing state a new government establishes itself by revolution: in this class of case the principle indicated above was applied by the courts to the Soviet Government of Russia when it was recognized by His Majesty's Government as the *de facto* but not *de jure* Government of Russia.

(2) Where one existing state conquers and absorbs another existing state: Italy and Abyssinia is an example of this class of case, and the application of the principle in the *Bank of Ethiopia* case was the more striking because His Majesty's Government were still maintaining relations with the Emperor of Ethiopia as the *de jure* sovereign of the country.

(3) Where one existing state conquers and annexes a portion but not all of the territory of another state which continues to exist: there seems no reason to doubt that the principle applies here, provided the conquest is final and complete.

(4) Where a new state arises in part of the territory of an old one which continues to exist: in this case also the same principle applies.

(5) Where a civil war is still in progress in an existing state between two parties both struggling to establish control over the whole state and the insurgent side establishes an effective administration over part of the territory and recognition of belligerency (*a*) is, (*b*) is not, accorded by other powers: the question of the application of the principle in this class of case is deferred for consideration later, in connexion with the Spanish civil war cases.[1]

In the cases in class (1) it has been held both in England and the U.S.A. that the recognition *de facto*, once given, relates back to the time when the new government first established itself, so as to cover acts and laws of that government in, or in relation to, territory under its actual control at the relevant time, done or enacted before the *de facto* recognition by His Majesty's Government (or the Government of the U.S.A. as the case may be) was accorded. This "relation back" view is criticized in the 1935 *Year Book* in an article by Mr. Mervyn Jones, but the criticism is probably only fully justified if there was a duty under international law on the governments of third states to announce *de facto* recognition as from the first moment it was legally justified and if governments did so, whereas on the contrary they commonly refrain from making any pronouncement till circumstances oblige them to do so and this may be long after the new government was entitled to *de facto* recognition.

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[1] In class (1) cases, it is probably true to say that *de facto* recognition produces all the legal consequences and that the difference between it and *de jure* recognition is nothing more than a difference of political attitude towards the new government. The existing state remains with its existing territory and the change of government does not affect its treaty rights and obligations.

In class (4) cases also the difference between *de jure* and *de facto* recognition of the new state is mainly only a difference of political attitude by the recognizing government and the former adds no legal consequences to the latter, but a government which only recognized a new state *de facto* would perhaps hardly be justified in acquiring territory from it. Once the new state is established *de facto*, its territory remains affected only by those treaty rights and obligations acquired by the old state which are "real" as opposed to "personal", i.e. those which go with the territory into whatever hands it passes.

In class (2) and (3) cases, the position is more complicated. No doubt the new ruler of the territory is only bound by the "real" and not the "personal" treaties of the previous sovereign of the territory as from the moment when his position is established *de facto*. But it is not clear that previous treaties concluded by him and conferring rights and obligations in respect of all his territories (viz. commercial or extradition treaties, &c.) apply to his newly acquired territory until his position is recognized *de jure* by the other party or parties to the treaty. Further, a party which only recognized the new sovereign *de facto* could hardly acquire territory from him.

In class (5) cases the whole of the old state remains bound by previously concluded treaties since there is no question of the creation of a new state or transfer of territory from one state to another: consequently both conflicting administrations should observe them.

Further, in cases in classes (2), (3), and (4), there may be a question, whether the new sovereign, only recognized *de facto*, can claim all the rights of a successor state, for example, debts owing by persons in third countries to the former government arising out of (for instance) concessionary contracts (see case no. 2 below).

In the *Bank of Ethiopia* case, Clauson J. applied the same principle of "relation back" to a case in class (2) and this seems right.[1] But at some point of time the Italian Government in Ethiopia ceased to be in the position of a power in the military occupation of enemy territory and became the *de facto* government of the country, and the retro-active effect of the *de facto* recognition can hardly go back farther than this moment.[2] The learned judge does not specifically consider this question or say when he thought this moment was. He carried the retro-active effect of the *de facto* recognition back to the Italian proclamation of annexation of the country, which was sufficient for the case he had to decide, and on the facts this may well have been right, but it would not always be justifiable to carry it back to the date of the proclamation of annexation by the power in military occupation, as such a proclamation may be premature. The powers of the "military occupier" and of the "*de facto* government" are in international law quite different, and an Italian decree dissolving and putting an Ethiopian bank into liquidation would clearly be, *ultra vires*, if Italy had been merely in military occupation. The view to the contrary expressed (*obiter*) by Clauson J. on pp. 522–3 seems to be wrong. A power in military occupation might justifiably take *some* steps to control the bank of issue of the occupied country but certainly could not dissolve it.

The other case arising out of the Italian annexation of Ethiopia is *The Emperor Haile Selassie* v. *Cables and Wireless, Ltd.* This case raises but does not decide an interesting "state succession" point.

Case No. 2. Haile Selassie v. *Cables and Wireless, Ltd.* Bennett J. 54 T.L.R. 628.

> The defendant company concluded in 1934–5 a contract with the Director-General of Posts, Telephones and Telegraphs of Ethiopia, at that time the head of a department of the government of the plaintiff as sovereign of Ethiopia, with regard to the transmission of radio messages between the state W.T. station in Ethiopia and the defendants' station in Great Britain, under which the charges collected from the senders of messages transmitted were to be apportioned between the two stations. The Ethiopian state W.T. station was closed down by the Italian authorities on May 2, 1936. The plaintiff sought in this action, begun on January 4, 1937, to recover the balance due to the Director-General under this contract, and it was agreed that a sum of £10,613 was so due.
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> It was held that the Director-General in making this contract did so on behalf of the plaintiff as the sovereign of Ethiopia so that the rights and obligations thereunder belonged to the Ethiopian Empire, and the defendants produced letters from the Italian Ambassador in London on February 2 and April 14, 1937, stating that the Italian Government claimed that this money was now payable to them and did not agree to submit to the jurisdiction of the English courts for the determination of their claim. Letters from the Foreign Office dated January, 1938, were produced to the court stating that H.M.G. (i) recognized the plaintiff as *de jure* Emperor of Ethiopia, (ii) recognized that the Italian Government were the *de facto* government

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[1] The position would appear to be the same as regards cases in classes (3) and (4), at any rate where decisions have to be given at a time when the contracting parties have not concluded any treaty regulating the new state of things. If and when there is such a treaty, however, its provisions may affect the matter.

[2] The same point may arise in class (3) cases.

of all parts of Ethiopia under their control and that they were in effective control of virtually the whole of Ethiopia, (iii) recognized Dr. Martin as the Minister Plenipotentiary of the plaintiff accredited to the Court of St. James's.

The defendants admitted that the money was payable either to the plaintiff or to the Italian Government, but they were unable to take the normal course of interpleading[1] because that would involve impleading the Italian Government who did not submit to the jurisdiction. The defendants also contended that the right to recover these moneys had passed from the plaintiff to the Italian Government because the Italian Government was now recognized as the *de facto* Government of Ethiopia.

Bennett J. held that he could not pronounce upon the claim of the plaintiff without determining whether the claim of the Italian Government was well-founded and that as the Italian Government did not submit to the jurisdiction he could not do this without violating the immunity of that government as a foreign sovereign; the action must therefore be stayed.

The ground of the decision—the immunity of the Italian Government—will be considered later, after the *Cristina* case (Case No. 4) which deals with another question of immunity. The question whether the Italian Government had succeeded to this right of action against the defendant company was not decided. The international rules with regard to state succession are somewhat uncertain, but it seems probable that a successor in title to the sovereignty of the country would normally be held to succeed to the rights under this concessionary contract. But in this case there would remain the points: (1) whether there is any such succession when the new sovereign is only recognized *de facto* and the old sovereign is still recognized *de jure* (it is possible to distinguish this question from the question of the recognition of the *de facto* government's legislation as the law of the country); (2) whether, even if the answer to (1) is in the affirmative, the succession takes place when the *de facto* new sovereign is recognized as the government of virtually the whole but not quite the whole of the new country—a question which may perhaps depend on the exact nature of the contract in question.

While it would have been interesting to have had a decision on these points, there is sufficient doubt and difficulty in them to justify Bennett J., even if he had not felt precluded from doing so on the ground of immunity, in his hesitation to decide against the plaintiff and *a fortiori* to decide for the plaintiff when the arguments against the plaintiff's right had only been presented by the defendant company and not by the Italian Government, who was the party really interested in defeating that claim.

The Spanish civil war cases are also two in number. In the case of the *Banco de Bilbao* v. *Rey* (Case No. 3), the principle that the acts and legislation of the government which in fact exercises effective administration over foreign territory must be accorded the recognition due to the acts and legislation of a foreign sovereign, was applied to the acts and legislation of an insurgent government in a civil war, so far as territory under the effective control of the insurgents was concerned. It was applied although there had been no recognition of belligerency[2] and although the other party to the conflict was still recognized as the *de jure* government of the whole country and had passed conflicting decrees which purported to apply to territory (and persons or corporations therein) under insurgent control. The decision was based on a statement from the Foreign Office, dated February 17, 1938, just before the hearing in the Court of Appeal, that His Majesty's Government recognized the government of General Franco as an insurgent government *de facto* exercising effective administrative control over certain portions of Spain, which were specified, with dates as from which this government obtained control in these various parts: that the Barcelona Government was still recognized as the *de jure* government of the whole of Spain; that His Majesty's Government had accorded no recognition to General Franco other than that stated above: that the government of General Franco was not a government which was subordinate to any other government in Spain[1] and that the question whether the government of General Franco was to be regarded for any purpose as the government of an independent foreign sovereign was a question of law to be decided on the basis of this information and in relation to the issue before the court.[2]

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[1] That is to say, serve a notice on the plaintiff and on the Italian Government under which both these parties would, if they desired to pursue their claim, be obliged to appear: if they appeared the court would settle the issue to be tried between them, making one party plaintiff and the other defendant according to the circumstances. A party on whom the notice is served and who does not appear may have judgment given against him.

[2] *A fortiori* therefore if there has been such a recognition.

In this case also the principle of "relation back" was applied. The legislation of General Franco was recognized as the law of Spain for that part of Spain controlled by him as from the dates (supplied in this case by the Foreign Office) on which he established control in the different parts of the country. It will be seen, therefore, that the position in the fifth of the five classes of cases mentioned above is the same, or much the same, as in the other four.

Case No. 3. Banco de Bilbao v. *Rey.* (*Lewis J. and C. A.*). 54 T.L.R.

This case was brought before the English courts by certain persons, claiming the right to sue in the name of the bank (a corporation formed under Spanish law with its head office (*siège social*) at Bilbao in the Basque country and branches in many towns in Spain and in towns abroad) against S. and R. who had for many years managed the London branch of the bank under powers of attorney from the board of directors.

The plaintiffs sought an order for the delivery to A by the defendants of the management of the London branch, and its premises and property, on the ground that they were the directors of the bank and had cancelled the powers of attorney of the defendants and issued powers to A to replace them. The defendants disputed the right of the plaintiffs to sue in the name of the bank, their claim to be directors and the validity of their cancellation of the defendants' powers and of the powers granted to A.

The plaintiffs were appointed as directors, to replace the former directors elected by the shareholders in conformity with the statutes of the bank, by an order of the Basque Government made on January 5, 1937, under a decree of that government of December 23, 1936, which amended the constitution of banks in Basque territory and provided for the appointment of new boards.

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[1] i.e. the authority of his government was not limited, like that of a provincial or municipal government, to powers delegated by a recognized superior legislative authority. The acts and legislation of foreign subordinate governments within the scope of their authority are recognized in England. It is an interesting question worth detailed study whether in any, and if so what, cases such subordinate governments can claim immunity from suit.

[2] The issue before the court here was whether the legislation of an insurgent government could be regarded as the legislation of a foreign sovereign, and the court answered affirmatively. Another issue which might well arise is whether such a government can claim immunity from the jurisdiction as the government of a foreign sovereign. There is no English decision directly on the point, but it is difficult to see in principle how a court could refuse to recognize as immune from the jurisdiction a government whose legislation it had recognized as that of an independent foreign sovereign. In the *Gagara*, [1919] P. 95, the immunity of the provisional *de facto* Government of Estonia was recognized at a time when that government could hardly claim more than a provisional belligerent status. There are, moreover, a whole series of United States decisions which would possess in England a very strong persuasive authority. Under these decisions the immunity of many unrecognized insurgent administrations has been recognized: viz. the Omsk All-Russian Government of Admiral Kolchak (237 N.Y. 150: 142 N.E. 569); the Government of General Deniken (232 App. Div. (N.Y.) 204: 249 N.Y. Supp.); an insurgent Venezuelan Government (*Underhill* v. *Herdandez*, 168 U.S. 250).

In June, 1937, when the case came for trial before Lewis J. in first instance, Bilbao and the greater portion of the Basque provinces were still under the control of the Basque Government, a government enjoying a considerable measure of administrative and legislative autonomy under the Spanish law of October 1936 passed by the Cortes of the Spanish Republic, which engaged in the war in the support of the *de jure* Spanish Government at Valencia (later Barcelona).

Lewis J. decided that the Basque decree was *ultra vires* the legislative authority of the Basque Government under the law of October 1936, that the plaintiffs were not the directors of the bank and consequently they could not cancel the powers of attorney of the defendants.

The plaintiffs appealed, but before the appeal was heard (in February 1938) General Franco occupied Bilbao on June 19, 1937, and the rest of the Basque country within the next three months; the plaintiffs moved the head office and documents of the bank from Bilbao to Santander, then to Valencia and then to Barcelona.

The Spanish (Barcelona) Government passed decrees on August 22 and September 30, 1937, later confirmed by the Cortes, transferring the head offices of all companies whose head offices were in the Basque country to Barcelona or Valencia and validating retrospectively the Basque Banking Decree of December 1936, and all acts done under it.

General Franco's Government passed decrees on December 29, 1937, to nullify all changes in the legal domicil of Basque companies made since July 1936 and all proceedings by the Spanish Government against the original directors of the bank.

The issue, therefore, before the Court of Appeal was whether the Barcelona Government's decrees of August and September 1937 or those of General Franco should be recognized as the law which applied to this bank. The Court of Appeal had before them the statements of the Foreign Office referred to above. The appellants did not before the Court of Appeal seriously contest the correctness of the decision of Lewis J. on the facts as they then had been; both sides relied on events which had taken place subsequently. As the Court of Appeal pointed out, the procedure followed by the defendants in this case and not challenged in the court below was wrong: they should have applied to have this action struck out as being brought in the name of the bank by persons who had no right to sue in that name, and should not have defended the action. If the correct procedure had been followed, the plaintiffs' action would have been struck out and the plaintiffs could have started a new action in which the right of the plaintiffs to sue in the name of the bank in the new circumstances could have been tried. Though it was doubtful whether the plaintiffs had the right to ask for the reversal on appeal of a decision which was correct at the time it was given by relying on occurrences since that decision, the Court of Appeal thought it expedient to decide what was the position in the new circumstances.

The Court of Appeal held (1) that the question what persons were the directors of the bank depended on the statutes of the bank and the law which governed these statutes, namely the law of the place of the corporate domicil, Bilbao, i.e. the laws of the government in whose territory Bilbao is situate.[1] (2) That the purported transfer of the head office to Barcelona by directors, who were not then legally directors, was invalid at the time it was made, and the legislation of the *de jure* Spanish Government, which could have validated both these things if it had been passed before Bilbao passed out of its control, could not validate it retrospectively when enacted too late, after Bilbao had been lost. (3) That the appeal therefore failed because the appellants' case rested entirely on this legislation.

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[1] It is interesting to observe that in the case of a corporation having branches in both parts of Spain as well as abroad, the Court of Appeal applied the law which prevailed at the head office (*siège social*) of the company. The *Bank of Ethiopia* case raised no such difficult problem—not merely its head office but all its branches were in territory administered by the Italian authorities.

It will be convenient to reserve comments on the second Spanish case—the *Cristina*—until the end of the digest.

Case No. 4. The Cristina. (Bucknill J.: Court of Appeal: and House of Lords) 54 T.L.R. 512.

Bilbao was captured on June 19, 1937, by the forces of General Franco and passed from the control of the Spanish (Valencia-Barcelona) Government to the administration of General Franco. A considerable number of Spanish ships were registered at Bilbao and owned by Basque companies.

On June 28 the Spanish Government issued a decree under which all Spanish ships registered at Bilbao were requisitioned by the Spanish Government, and an interpretative decree of September 4 made it clear that the decree of June 28 was intended to apply to all such ships whether they were in Spanish ports, on the high seas, or in foreign ports. The decree purported to vest in the requisitioning government possession and control of the ships, but not ownership. In pursuance of this decree all Spanish consuls in the United Kingdom were given by the Spanish Ambassador lists of Bilbao ships and instructed on the arrival of a ship on the list in a United Kingdom port to obtain from the captain the ship's papers, endorse the requisition thereon, and obtain an undertaking from the captain and chief officers to receive his orders from the Spanish Government. The evidence in this case shows that a list of 38 vessels belonging to 14 companies was given to the Spanish consul at Cardiff.

In the course of July and August, as Bilbao ships came into ports in England, Wales, Scotland, and Northern Ireland, the Spanish Government obtained possession and control of about 40 ships in this way. In some cases the captains and chief officers refused to serve the Spanish Government and left with the ship's papers or allowed themselves to be paid off, and these captains were replaced by officers chosen by the consuls. The sympathies of the majority of the crew seem always to have been with the Spanish Government, and the Spanish consuls had no difficulty in obtaining possession of the vessels peacefully without invoking or receiving any assistance from the police or local authorities. The owning companies were in most cases opposed to the requisition and instituted proceedings in the courts of England, Scotland, and Northern Ireland to recover possession of their vessels. The proceedings involved the arrest and detention of the ships during the proceedings. In November 1937, 19 Spanish vessels were under arrest in England as well as others in Scotland and Northern Ireland as the result of such proceedings. In some cases the proceedings were complicated by disputes between different individuals claiming the right to act for the owning company, those on one side opposing the requisition and those on the other consenting to it.

The *Cristina* case was a test case governing all these proceedings in the sense that it raised and decided a preliminary issue, which was common to all the cases and which, if decided one way, virtually terminated all the proceedings. All the other cases were stayed pending the final decision of this issue by the House of Lords.

The *Cristina*, a Spanish vessel registered in Bilbao and on the list given to the Spanish Consul at Cardiff, arrived at Cardiff on July 9 having never been in Spanish waters since the decree was issued. On July 14 the Spanish consul had obtained for the Spanish Government possession and control of the vessel after dismissing the captain and chief officer and replacing them. On July 23 a writ *in rem* was issued at the suit of the owning company (Compañia Naviera Vascongada) claiming to have possession of the vessel adjudged to them and calling on all persons claiming an interest in the vessel to enter an appearance in the Admiralty Division. The effect of this writ was to cause the vessel to be arrested and detained in the custody of the Admiralty Marshal until the court should make an order releasing the ship. If the plaintiffs obtained the order for possession which they sought, the order would operate *in rem*, i.e. would give a title to possession valid in the United Kingdom against any other person who claimed possession or control, and consequently any other claimant who did not wish his claim lost by default was obliged either to defend his title or to get the writ set aside.

The Spanish Government consequently entered a conditional appearance on July 27 and gave notice of motion to set aside the writ on the ground that they were in possession of the vessel and the action impleaded them, the government of a foreign sovereign state, and they did not submit to the jurisdiction. They further contended that they were entitled to possession by virtue of the decree of June 28 and execution of the decree in regard to this ship by the Spanish consul at Cardiff.[1]

The plaintiffs did not dispute that the Spanish Government was the government of a foreign sovereign state and entitled to claim any immunity attaching to such status.[2] They disputed the validity of the decree of June 28 under the Spanish constitution but none of the judges thought it material to decide this point. They contended further that in any case a Spanish requisitioning decree could not give a title to a vessel which was in an English port and had never since the issue of the decree been within the jurisdiction of the government enacting it, and that the action of the consul in taking possession was a trespass. None of the judges found it necessary to pronounce on this point.[3]

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[1] As an alternative ground for setting aside the writ the Spanish Government contended that this was a dispute between two foreign parties with regard to the possession of a foreign ship and that the English courts had in such a case a discretion to refuse to entertain the proceedings and should exercise that discretion. None of the judges relied upon this ground in support of his decision.

[2] The status of General Franco's Government was not involved in these proceedings. There is indeed (*vide* footnote 2 to p. 241 *ante*) some reason to suppose that the English courts would hold that this government could also claim immunity from suit, as a *de facto* insurgent government. It could, however, have made no difference to these proceedings if General Franco's Government had been recognized as a belligerent government or as having any other status, so long as the Spanish Government was still recognized as a foreign sovereign government. It is not thought that the following passages from the speech of Lord Wright affect this view:

> "At the trial it was admitted on behalf of the Appellants that the Respondent, the Republican Government of Spain, is an independent sovereign state, recognized by His Majesty's Government. It was not contested that this admission involved that the Republican Government was the sole government recognized by His Majesty's Government in and for Spain. The case has accordingly proceeded throughout on that footing. This House and the Courts below have thus no judicial knowledge, save as appears from the recitals in the Decree, of the conflict which it is general knowledge is going on in Spain, or the division of territory between the contesting forces. . . . But the rule only applies as between sovereign states recognized as such by His Majesty's Government. For the purposes of the present case so far as concerns Spain, the Respondents are such a sovereign state."

[3] This point is a very interesting one which would fall for decision if the requisitioning government appeared as plaintiff claiming an order for delivery of a ship which it had requisitioned but of which it had not obtained possession. There is no doubt that most governments have, in time of war or emergency, powers to requisition ships flying their flag in foreign ports: generally, however, when they exercise it, the owner submits to the requisition and the question whether the requisition must be recognized by the courts or authorities of the foreign country as operative to transfer the right of possession to a vessel in its ports does not arise. It is clear that foreign legislation confiscating or nationalizing the property of nationals or national companies is not recognized in England as applying to property not situated within the territorial jurisdiction of the

The principal contention of the plaintiffs was (*a*) that the action of the Spanish Government through its consuls in taking possession of the ships against the will of their owners, and thus enforcing their requisition in United Kingdom ports, was a violation of the territorial sovereignty of the United Kingdom,[1] and (*b*) where a foreign sovereign had obtained possession by a violation of British sovereignty, there was no obligation on the courts of the country to respect his immunity in regard to property so obtained. None of the judges found it necessary to pronounce on (*a*), the first part of this contention, since they rejected the second half. The plaintiffs also contended that a foreign sovereign could not claim immunity in respect of property of which he did not claim ownership but only possession or right of control.

Bucknill J. and all three members of the Court of Appeal and five Law Lords were all unanimous in holding that the writ should be set aside as impleading a foreign sovereign, and the reasons given by the courts below were substantially the same as those adopted by Lords Atkin and Wright in the House of Lords.

Held: Lord Atkin and Lord Wright:

Two propositions of international law are indisputably engrafted into English law,

(1) a foreign sovereign cannot be made a party to legal proceedings against his will whether the proceedings involve process against his person or seek to recover from him specific property or damages;

(2) property of which a foreign sovereign is the owner or of which he is in possession or control cannot be seized or detained by legal process, whether he is a party to the proceedings or not.

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country enacting it, and in the *Jupiter No. 3* ([1927] P. 122 and 250) this was so held in first instance as regards the nationalization of ships by the Soviet Government belonging to Russian shipping companies. Is the requisitioning or nationalizing of ships on a different footing from such action in relation to other property on the ground that a ship in a foreign port, though under the jurisdiction of the foreign state, also remains to a large extent subject to the legislation of her flag state? Lord Wright said "It must be noted that the *Cristina* even when in Cardiff docks may have, as being a foreign merchant ship, a different status from an ordinary chattel on land". Further, in the case of a civil war there is another question which remains, even if it is assumed that ordinarily such requisitions are recognized, namely, can both sides requisition all ships flying the flag of the country in question and if not is there any criterion to be applied by the courts of a foreign country to determine what ships each side can requisition? In fact both sides seize all the ships they can without regard to whether they are registered in a port under their control or whether the owning companies have their head offices in one part of the country or the other, and it is not clear that the control of the port of registry or of the place where is situate the head office of the owning company is a proper criterion.

[1] Actually the phrase "violation of international comity" was used, but this vague and much abused expression hardly conveys the meaning. It is clear that this contention would fail if the requisitioning decree could be recognized by the English courts as applying to ships in English ports (see previous footnote), but even if the decree did not have this effect it does not necessarily follow that there was any such violation of territorial sovereignty. Consuls have many functions with regard to merchant shipping flying their flag, and these include the application of the law of the flag state with regard to questions of personnel and internal management, questions from which the authorities of the foreign territorial state disinterest themselves provided that no breach of the peace or violation of the local law occurs. The local authorities neither interfere with nor assist the consuls in the discharge of their functions and the position may be much the same as regards requisitions effected by consular officers. They may carry them out provided they can do so peacefully. They will get no assistance but will suffer no hindrance from the local authorities. It appears that in the ordinary way the right and power of the consul to requisition a ship of his flag for his government depends on whether he can get his order obeyed peacefully.

It has already been held that the second proposition applies to a ship under the control of a foreign government by reason of a requisition: the *Broadmayne*, [1936] P. 64, the *Mexicano*, 32 T.L.R. 519, the *Crimdon*, 35 T.L.R. 81, the *Gagara*, [1919] P. 95, the *Jupiter No. 1* [1924] P. 236. In fact the recitals to the Spanish decree would be sufficient to bring the *Cristina* within the category of property destined to the "public use", but it is settled that, in English law, this rule applies to property used by a state for commercial purposes as well as other property, although there is some difference in the practice of nations in this respect.[1] This is shown in the case of ships by the English cases of *Young* v. *s.s. Scotia*, [1903] A.C. 501, concerning a train ferry owned by the Crown, *Porto Alexandre*, [1920] P. 30, and decisions of the U.S. Supreme Court are to the same effect. The Brussels Convention of 1926 with regard to the immunity of state-owned ships was concluded to avoid the undesirable consequences of the immunity of ships engaged in state trading, but the convention is not yet in force in this country.

There may be exceptions to these propositions; for instance in suits where title to land within the jurisdiction is concerned; where a fund in court is being administered in which a foreign sovereign is interested; in representative actions, such as debenture holders' actions where a foreign sovereign is a debenture holder; or in the winding up of a company in whose assets the foreign sovereign claims an interest; but these exceptions are irrelevant to the present case.

If a vessel of which a foreign sovereign is in possession or control is arrested by a writ *in rem*, not merely is proposition (2) infringed but also proposition (1), since all persons claiming an interest in the ship are ordered to appear as defendants and in fact the writ is issued to obtain possession from the foreign sovereign and if and when he appears the proceedings are against him personally.

The Spanish Government were in possession and control of the *Cristina* as from July 14. The possession was proved and it is unnecessary to consider whether the English courts would have to accept as conclusive a bare assertion by the foreign government that it was in possession.[2] The immunity of the foreign sovereign is an immunity from suit even in respect of conduct which is a breach of the local municipal law, and if, as contended, the action of the Spanish Government was a trespass under English municipal law or a violation of British territorial sovereignty, the matter is one to be dealt with by H.M.G. through diplomatic action and not by litigation in the English courts.

Lords Thankerton, Macmillan, and Maugham agreed with the reasoning of Lords Atkin and Wright except that they reserved their view as to whether the property of a foreign sovereign which was not destined for public purposes but used for commercial purposes was immune from seizure and detention, and whether it is not permissible to implead a foreign sovereign to the extent of bringing actions *in rem* against such property and consequently whether the *Porto Alexandre* was correctly decided. In view of the diversity of international practice with regard to the immunity of such property they considered that it was open to doubt if this extension of immunity could be said to be engrafted into English law as a rule of international law since it did not appear to have attracted the requisite general international assent.

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[1] No French decision in circumstances precisely parallel to the *Cristina* case has been found. In one case (*Axpe Mendi*) the Court of Appeal of Poitiers on July 29, 1937, refused to recognize the immunity from the jurisdiction of a ship in a French port which had only been requisitioned by the Spanish Government after the institution of the French proceedings detaining her. In another case (*s.s. Ixtas Zuri*) the same court, on December 20, 1937, recognized the immunity of a Spanish ship which had been in a port under the control of the Spanish Government after the requisitioning decree had been made and where the actual order or requisition had been served on the ship later in a French port by a Spanish consul.

[2] Lord Wright said he would hesitate as at present advised so to hold. Lord Maugham expressed the view that in order to claim immunity for property the foreign sovereign must prove he is in possession or control or, if he is not in possession or control, prove his title to ownership, possession, or control, just as he must do if he wants to recover as plaintiff property from some other person.

While the *Cristina* case leaves entirely undecided the most interesting question whether a foreign government's decree requisitioning ships flying its flag when they are in English ports would be recognized in England as transferring to that government a right to possession or control of the ships, the decision is of considerable interest for the following reasons: (1) as being a decision of the supreme tribunal, laying down the rules with regard to the immunity from process of the property of a foreign sovereign, the previous cases on this point being all decisions of lower courts; (2) the doubts expressed by three of the five Law Lords as to whether the immunity which a foreign sovereign could claim as regards his property extended to property which was not destined for public purposes but for commerce, such as a ship engaged in trade, whereas earlier decisions of the Court of Appeal had been quite categorical on this point; the reason given for this doubt is that there can hardly be said to be any rule of international law to this effect requiring such immunity to be given, seeing that it is not accorded in many countries, and the immunity, if it existed, could only be imported into English law as a rule of international law. It must be pointed out, however, that the divergence of practice between countries in this respect is not confined to the immunity of the property of a foreign sovereign. Those countries which do not treat the property of a foreign sovereign destined to commercial purposes as immune from seizure and detention also hold that the foreign sovereign can be impleaded directly in regard to claims arising out of commercial transactions and other non-sovereign acts; and indeed it would be illogical to refuse immunity to the commercial property and concede personal immunity from commercial actions. Indeed there are countries that would hold that a foreign sovereign can be sued personally in respect of commercial dealings but would still hold it improper to seize and levy execution upon any portion of his property. (3) The great political importance of the case, seeing that, in effect, the question involved in these proceedings was whether some forty Spanish ships should be used for the benefit of one or the other of the conflicting parties in the Spanish civil war. On the one hand, there was the Spanish Government which might complain that it had been deprived for nine important months of the use of these vessels which it was finally held the English courts had no jurisdiction to detain; on the other hand, the Government of General Franco which might be incensed because the Spanish Government had in effect been able to requisition and seize in English ports a number of Spanish ships belonging to companies who would prefer to use them in the service of General Franco and which were domiciled in territory which was under the control of General Franco.[1]

It will now be convenient to consider—in the light of the *Cristina* case, and its clear distinction between the personal immunity of the foreign sovereign from suit and the immunity of his property from seizure and detention—the decision on the ground of the immunity of a foreign sovereign of Bennett J. in the *Cables and Wireless* case (Case No. 2).

In the first place it was assumed in this case that the defendant company, who admitted to owing a sum of money which both the plaintiff and the Italian Government claimed, could not serve an interpleader notice against the Italian Government which did not submit to the jurisdiction.

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[1] Before leaving the Spanish civil war cases it is just worth noting that in the *Société Belge &c.* v. *London & Lancashire Insurance* (*The Times*, March 15, 1938) Porter J. held an insurance company liable to pay under a policy insuring certain cranes, pontoons, and tugs against "restraints of princes and peoples" when the insured property was at the beginning of the war seized and confiscated in Valencia harbour by a workers' committee, since the committee was supported by the Popular Executive Committee which became the Government of Valencia whose acts were accepted by the Central Government.

There are two kinds of interpleader proceedings: (*a*) a sheriff's interpleader, when the sheriff, carrying out an order to levy execution on the tangible property of a judgment debtor, seizes property which a third party claims to be his and not the property of the debtor: this was not the present case, but it seems that in such a case, if the third party is a foreign sovereign, the position is closely analogous to process *in rem*, since tangible property is seized and if the seizure is upheld and the property is sold the purchaser acquires a title valid against all the world. To interplead against the foreign sovereign would violate both of the two propositions laid down in the *Cristina* case. (*b*) An interpleader by a defendant who admits that A or B can claim something from him but wants protection against being made liable twice. In a case where B is a foreign sovereign, would it be a violation of (i) his personal immunity from suit, or (ii) the immunity of his property from seizure or detention by legal process, or both, to allow the interpleader? Point (i) depends on whether it is to be held that B would be thus made a defendant against his will, or that he is merely being given an opportunity to come in and protect his claim as a plaintiff, on the analogy of the instances quoted by Lord Wright of a debenture holder's action or a company which is being wound up. In principle there seems to be much to be said on both sides, but it has been held consistently that interpleader notices cannot be served on the Crown, and on grounds which apply equally to a foreign sovereign. For the reasons given below it is submitted that no question of immunity in respect of property arises in this type of interpleader.

The defendant in the *Cables and Wireless* case was not able to interplead. If in these circumstances Bennett J. had felt able to decide the case against the plaintiff he would clearly not have violated the immunity of the Italian Government, but would he have done so if he had decided in favour of the plaintiff? This is not so clear, and Bennett J. in so holding does not state which type of immunity would have been violated.[1]

It is submitted (1) that the personal immunity of the Italian Government would not have been violated since it would not have been made a party to the proceedings and the judgment would not have any binding force on it;

(2) that no immunity in respect of property would have been violated because even if a claim to a debt, a chose in action, were property which could be the subject of such an immunity, the Italian Government were not in possession of it,

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[1] He merely quotes the *Parlement Belge* (until the *Cristina* the leading case on the immunity of a state ship from process *in rem*) and two sentences from the judgment of Scrutton L.J. in *Luther* v. *Sagor* ([1921] 3 K.B. at p. 555), a case which did not raise any question of immunity but turned on the recognition of the acts and legislation of a *de facto* government confiscating property in its territory. The confiscated property was sold to a private person and brought to England by him, and the original owner claimed it. The sentences quoted were *obiter* for the decision and if taken as a pronouncement on immunity of general application, as Bennett J. apparently did, they would mean that, if a foreign sovereign has claimed property rightly or wrongly, then whether the property was situate in his territory or not and even if he is no longer in possession of it, this claim cannot be challenged in the courts even in a suit between private parties, to one of whom the foreign sovereign had delivered the property. The immunity of a foreign sovereign does not extend so far. The argument of Scrutton L.J. in the passage quoted by Bennett J. was that, as the courts could not have questioned the title of the Soviet Government to the property if held in this country by its authorized agent, the courts should not indirectly question it when the property had been transferred to a private person. The argument had in any case no relation to facts such as arose in this case, and is, besides being *obiter*, incorrect, as is shown by the Court of Appeal decision in the *Jupiter No. 2 case* ([1925] P. 69). It is possible in a suit between private persons to challenge the title which a foreign sovereign purported to transfer to one of them without infringing any immunity. The real ground for the decision in the *Sagor* case is that the Soviet Government acquired its title to the property when it was in Soviet Russia under Soviet legislation.

and not being in possession, the courts would not be bound by their mere claim to it; the government would have to prove its title to establish immunity (see doubts of Lord Wright and views of Lord Maugham in the *Cristina* case referred to above). In fact no title *in rem* to the debt would have been created by the decision. The Italian Government's claim to be paid would be legally unaffected. Bennett J. gave, it is suggested, the wrong reason for a right conclusion. He might rightly have held that he could not give judgment for the plaintiff in the circumstances without injustice to the defendants, because since they could not interplead, there was no means of making the judgment binding on the Italian Government, and consequently the defendants might still be sued and perhaps successfully by the Italian Government in respect of the same debt.

Case No. 5. Finska Angfartygs A/B v. *Baring Brothers* (54 T.L.R. 147) marks perhaps the final stage of efforts extending over twenty years by Finnish shipowners to get payment for the use of their ships, and for the loss of some of them, during the war. These efforts have been the cause of "litigation" in the international sphere as well as in the courts of the United Kingdom. The case arose out of arrangements made during 1916–17 between the United Kingdom and the Imperial Russian Governments for the pooling of allied shipping during the war. As part of these arrangements certain Finnish ships belonging to the plaintiff companies were requisitioned in United Kingdom ports by a Russian committee in London, as agents for the Russian Government, and sub-chartered to the United Kingdom Government. The United Kingdom Government undertook to pay the Imperial Government for the hire of the ships and compensation for their loss at British Blue Book rates, and the Imperial Russian Government undertook to pay the plaintiffs at certain other and more favourable rates agreed at Petrograd. There were also in operation at the same time arrangements made between the two governments for the financing of Russian purchases of war supplies requiring payment in sterling under which large sums in sterling were placed to the credit of the Imperial Russian Government by the Government of the United Kingdom with the defendants, a London banking house, part of these sums being in an account known as the "Compte Spécial".

The plaintiffs had, in negotiations in 1917 with Russian Government Departments, settled that certain sums in sterling were to be paid to the plaintiffs for hire and compensation, and certain directions were given in the form of permissions and orders between different Government Departments which, if the procedure had been completed, would have led to the payment of these sums to the plaintiffs by the defendants out of the "Compte Spécial". Before the procedure was complete, however, the Bolshevik Revolution took place and the Soviet Government repudiated all the debts of its Imperial predecessor. The United Kingdom Government had paid some sums to the Russian Government in respect of these ships, but had ceased to do so, claiming to set off other and much larger sums due by the latter for other shipping services. The balances in the "Compte Spécial" remained with the defendants, the subject of possible claims by the Soviet Government as successor to the Imperial Russian Government, and by the United Kingdom Government arising out of its financial transactions with the latter.

The plaintiff shipowners, being unable to obtain payment in Russia, then tried to claim from the Government of the United Kingdom on the basis that their ships had been used and requisitioned by the latter. The claim was brought first before the Admiralty Transport Arbitration Board and failed in 1926. There was a right of appeal on points of law, but the plaintiffs did not appeal. The Finnish Government then took up the claim against the United Kingdom and asked for international arbitration. This was refused, and in 1931 the Finnish Government brought it before the Council of the League. In the course of the proceedings before the Council, in the years 1931–5, which brought no satisfaction to the plaintiffs, though they occasioned an important decision on the limits of the Council's action under Article 11 (2) of the Covenant, a preliminary point with regard to the application of the rule for the exhaustion of municipal remedies as a condition precedent to a diplomatic claim, was submitted to arbitration and led to an award in 1934 by Dr. Bagge which is the most important decision on this rule of international law. All efforts to obtain payment from the United Kingdom Government having failed, the plaintiffs again decided to pursue the line that it was the Russian Government which should pay them, and instituted these proceedings in which they claimed that the negotiations in Petrograd in 1917 and the permissions and orders issued by Departments of the Imperial Russian Government in that year constituted an assignment to them by the Russian Government of sums standing to the credit of the latter in the "Compte Spécial".[1]

This claim failed because Luxmoore J. held that the documents produced by the plaintiffs were only a direction by a Russian Government Department that steps should be taken to pay the agreed sums to the plaintiffs out of the "Compte Spécial": there was no evidence that all the necessary steps were taken or that the Russian Government intended to assign any part of the "Compte Spécial" to the plaintiffs, or that the plaintiffs intended to accept such an assignment in discharge of their claims.

In the course of the decision two points of law arose and were decided:

(1) By what law was the alleged assignment governed? Luxmoore J. held it was Russian law because the alleged assignment was a transaction in Russia between Russian subjects, and based this decision on the *Republica de Guatemala* v. *Nunez*[2] (a case in which three Lord Justices based their separate conclusions on conflicting grounds): he reserved the question whether, since the debt assigned was situated in England, it was also necessary that the assignment should be valid by English law. It is submitted, however, that the view expressed by Dr. Cheshire[3] is the only correct solution of this problem, namely, the law which determines the validity of a voluntary assignment is the proper law of the contract of the debt assigned.

(2) The evidence of the alleged assignment produced by the plaintiffs consisted of copies kept by them of documents forming part of the archives of the Russian Imperial Government, and the plaintiffs were unable to obtain through the Soviet Government certified copies of the originals, or even to ascertain if the originals still existed. It was held that section 7 of the Evidence Act, 1851, which provides that all acts of a foreign state may be proved by copies authenticated as therein set out, was permissive only and did not exclude admission of the best secondary evidence available where it was impossible to obtain from the proper sources copies in the form laid down by the Act.

St. Pierre v. *South American Stores, 1 All Eng. 206*[4] (Branson J.) (Case No. 6) was a case arising out of a contract to pay rent, governed by Chilean law and containing a gold clause. The facts of the case and the actual decision are not of general interest, but the following statement in the judgment is worth quoting:

> "It is my duty, therefore, in ascertaining the rights and duties of the parties under the contract, to apply the canons of construction, which would be applied by a Chilean court and to admit and consider *such evidence as a Chilean court would admit and consider*, in order to arrive at the intention of the parties. The ambit of matters which a Chilean court will consider, in order to ascertain the true intention of the parties to a contract, is much wider than that allowed under English law.

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[1] This is not the only case brought in the English courts in which an assignment of part of the balances in the Compte Spécial was claimed: see *Russian and English Bank* v. *Barings*, ([1932] 1 Ch. 435, *B.Y.B.* 1933, p. 187).

[2] [1927] 1 K.B. 669.

[3] *Private International Law*, 2nd ed., pp. 444 *et seqq*.

[4] In the 1937 volume, p. 234, a decision rejecting an application to stay this action was discussed, and in the 1936 volume, p. 215, the decision of the House of Lords in an earlier action arising out of the same contract.

> Evidence is admitted of negotiations, verbal or in writing, antecedent to the contract, and of subsequent writings passing between the parties or emanating from one of them, in the latter case, however, with the limitation that such writings are available only against the party from whom they emanate."

This statement of the duty of an English judge when he has to ascertain the effect of a contract governed by a foreign law is, it is submitted, of considerable interest and absolutely correct. The writer, however, knows of no other statement so clear and categorical and the words in italics are of particular importance owing to the tendency to apply too far the principle that matters of evidence are procedure and governed by the *lex fori*. The principle should properly only apply to the general procedure under which evidence is given and produced in court and not to particular rules as to the admissibility of evidence in certain circumstances, and still less to rules as regards the evidence required if an action is brought upon particular contracts. Rules of this kind directly affect the substantive rights of the parties, and if English rules of this kind are applied to a contract governed by foreign law, the rights of the parties as ascertained by the English courts are likely to be quite different from their rights as found by the courts of the foreign country in question. The classic example of this mistaken tendency is the old decision in *Leroux* v. *Brown* (12 C.B. 801) applying the Statute of Frauds to a contract governed by French law, a decision condemned by many writers[1] and criticized by some eminent judges.[2] This anomalous decision will presumably remain a part of our law until the House of Lords obtains the opportunity of overruling it, but the passage quoted above from Branson J.'s judgment is a useful corrective and as a statement of general principle might well be cited in the text-books on private international law. Acting on the principles above stated, the learned judge in this case, when dealing with the gold clause, held that the House of Lords decisions (*Feist's* case and the *International Trustee* case) on gold clauses in contracts governed by English or American law were irrelevant and that he must follow the effect of the Chilean decisions, which, although they might not be binding as precedents as English decisions are in England, were the best evidence of the effect of a gold clause of this kind in Chilean law and were, when they were almost all in one sense, virtually conclusive.

Case No. 7. Monaco v. *Monaco.* 157 Law Times Report, 231 (Luxmoore J.).

Prince R. of Monaco was a boy at school in England. The plaintiff, the reigning prince of Monaco, his grandfather, sought an order against Prince P. of Monaco, the boy's father and divorced husband of the heiress presumptive to the principality, to the effect that the plaintiff was entitled to custody of Prince R. and that Prince P. should not remove him from England without the plaintiff's consent. All the parties concerned were of Monegasque nationality and domicil and Prince R. had not been made a ward of court in England.

Luxmoore J. held it was first necessary to decide whether the plaintiff was the guardian of Prince R., and to determine this it was necessary to ascertain the position in Monegasque law. By that law, the custody of children is determined by the national law of the persons concerned whether they are members of the Royal Family or otherwise. The custody of Prince R. had been vested in the plaintiff by a Monegasque decree of 1930 enacted on the marital separation of the prince's parents, and by a further decree of 1936 enacted after their divorce. Consequently, the plaintiff was entitled to the order sought unless the defendant should show some reason why the court should not assist the plaintiff in respect of his legal rights to guardianship. The defendant did not do so and an order in the sense asked for by the plaintiff should be made with costs against the defendant. There was no rule that a foreign sovereign who was a successful plaintiff should not be awarded costs.

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[1] See, for example, Cheshire, *Private International Law*, 2nd ed., p. 635; Beckett, *B.Y.B.*, 1934, p. 70.

[2] Willes J. in 8 C.B. (N.S.) 299, 316, L.R. 1 C.P. 18.

As pointed out by Dr. Cheshire,[1] this case shows (1) that the law which determines who is the guardian of a child is the law of the domicil of the child:

(2) that, where a child is domiciled abroad, the guardian under the foreign law, just as the guardian under English law of a child domiciled here, will, if he appeals to the court for assistance to enforce his rights of custody, be granted such assistance, unless the defendant shows some good reason (presumably affecting the interests of the child) why such an order should not be made.

The court has a discretion to refuse to assist or to displace the legal guardian of any child in England but will not do so without good cause whether the legal guardian derives his title from English law or from the law of the foreign domicil.

Case No. 8 is a decision on the question of jurisdiction in nullity cases. Before dealing with it, it is convenient to recall that it was stated in the 1932 volume of the *Year Book*[2] that, as the result of recent decisions considered in that volume and in 1928,[3] a great clarification had taken place with regard to this question and it was now possible to state the position with reasonable certainty as follows:

In actions for nullity of marriage the English courts assume jurisdiction and recognize the jurisdiction of foreign courts (1) in any case where the parties are domiciled within the jurisdiction; and (2) where the marriage was celebrated within the jurisdiction, except where the suit is brought on a ground which made the marriage voidable (viz. impotence) and not void. Residence is not a ground for jurisdiction in nullity.[4]

Case No. 8. White v. *White*, [1937] P. 111 (Bucknill J.).

The petitioner went through a ceremony of marriage with the respondent (who did not appear) in 1926 in Australia. It was proved that at the time of this ceremony the respondent was still legally married to another woman. The respondent was domiciled in Australia. The petitioner was domiciled in England at the time of the ceremony and (unless she acquired the respondent's domicil by virtue of the ceremony) was still so domiciled. The petitioner was resident in England and the respondent in Australia.

The marriage in 1926 was never consummated and the petitioner returned to England alone two days after the ceremony: in 1927 she went to Australia to join the respondent but never did so, and returned to England in 1929.

The question of jurisdiction was argued by counsel for the petitioner and for the King's Proctor.

Held by Bucknill J.:

> (1) that the petitioner had not acquired the domicil of the respondent and remained domiciled in England: that therefore the court had jurisdiction, because the petitioner was domiciled in the jurisdiction; alternatively,
>
> (2) that there was jurisdiction because the petitioner was resident in England. It had been held in 1902 in *Roberts* v. *Brennan* that there was jurisdiction where both parties were resident in the jurisdiction.

Dr. Cheshire[5] condemns the reasoning of this judgment strongly. The second ground for the decision is particularly open to criticism because (1) the old case of *Roberts* v. *Brennan* relied upon is clearly overruled by later decisions seeing that the judgment stated that residence *not domicil* was the basis of jurisdiction in nullity; (2) even if the decision was good law to-day, it did not cover the present case, seeing that it made the basis of jurisdiction the existence of the matrimonial residence in the United Kingdom, and here the respondent husband had never been so resident.

The first ground for the decision is doubtful, but, it is submitted, not open to such strong condemnation. Though it is clearly established[1] that even in the case of a marriage void *ab initio* the woman acquires the domicil of the supposed husband if she lives with him after the marriage, there is some ground for holding that this would not happen where, as here, the parties have never lived together at all, and that therefore the courts of the woman's domicil should have jurisdiction as well as those of the man's domicil: at any rate, if the case is treated as resting upon this ground rather than upon the other, it is likely to introduce less confusion into the law.

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[1] *Private International Law*, 2nd ed., p. 400.

[2] p. 171.

[3] 1928, pp. 169–181.

[4] Cheshire, *Private International Law*, 2nd ed., p. 346, states the position in similar terms.

[5] *Private International Law*, 2nd ed., pp. 22 and 342.

Case No. 9, *In re Craven's Estate*, [1937] Ch. 423 (Farwell J.), deals with the question of the law applicable to determine the validity of a *donatio mortis causa*. An Englishwoman domiciled in England, being possessed of certain moneys and securities in a bank in Monaco, gave her son a power of attorney in respect of them. Subsequently, having in mind a pending operation which might prove fatal (and which in fact did so), she directed him to get this property into his own name because she wished it to be his in the event of her death, and he accordingly gave instructions to this effect to the bank, who complied with them. In connexion with the administration of this lady's estate in England, the validity of this *donatio mortis causa* arose because her executors were under a duty to get in and administer all her estate, and if the gift was valid, the moneys and securities comprised in it did not form part of the estate, and if it was invalid, they did.

It was held, in the first place, that the validity of the gift was governed by the law of England, but it is not quite clear on what ground it was so held.[2] It would appear, however, that the reasoning must be that a *donatio mortis causa* is so analogous to a will that it is governed by the same law as governs testamentary dispositions (the law of the domicil of the deceased), and that consequently English law must determine (1) whether the deceased had the capacity to make such a gift, (2) what are the requirements, from the point of view of conditions and form, necessary for a *donatio mortis causa*. English law, in fact, imposes no restrictions on a person's capacity to make such gifts or any special conditions as regards form. However, as the learned judge stated, it does make it a condition of the validity of the gift that there should be an effective parting with the ownership of the property according to the *lex situs* thereof. In this case the *situs* was Monaco, and on the evidence of Monegasque lawyers it was found that the instructions given by the son to the bank, under the power of attorney at the direction of the deceased, and the transfer of the money and securities to the son's name by the bank upon these instructions, did transfer the ownership to the son by the law of Monaco. It was therefore held that the gift was valid.

Case No. 10. In the 1936 and 1937 volumes of the *Year Book* two cases on the liability of a carrier by air were considered.[3] This year there is a third case raising some further points. This case is *Philippson* v. *Imperial Airways*, 53 T.L.R. 850 (Porter J.); 54 T.L.R. 523: (C.A.).

It is not necessary here to do more than to mention the new points raised in this case. The contract of carriage was (as in all these cases) in the form of an air consignment note which incorporated as conditions of the contract the "general conditions for carriage by air" of the International Air Traffic Association. These conditions contain some provisions which apply to "international carriages" only, others applying to "internal carriages"[4] only, and others applying to both. It is consequently generally necessary to determine whether a claim arises out of an "international carriage" or not. All the conditions applicable to "international carriage" are those contained in the Warsaw Convention of 1929 as those which the High Contracting Parties undertake to enforce in their territories to determine the liabilities of air carriers in "international carriage", and the definition of "international carriage" is set out in the convention, and these provisions of the Warsaw Convention, including the definition, are scheduled to the Carriage by Air Act, 1932, and thus incorporated into English law. Under the definition, a carriage between a territory of one High Contracting Party to the convention and a territory of another High Contracting Party is "international", whereas a carriage to or from a territory of a power which is not a High Contracting Party is not. It is therefore necessary to know whether a country is a territory of a High Contracting Party. Section 1 (2) of the Act of 1932 provides that "His Majesty may by Order in Council from time to time certify who are the High Contracting Parties to the convention and in respect of what territories they are respectively parties . . . and any such Order shall, except in so far as it has been superseded by a subsequent Order, be conclusive evidence of the matters so certified".

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[1] See *Lendrum*'s case 1929, *Scots Law Times Reports* 96, and Cheshire, *l.c.*, p. 339.

[2] England was (1) the country where the estate was being administered, and (2) the domicil of the deceased. It is submitted that (1) was not relevant although the head note seems to put the application of English law on this ground.

[3] 1936, P. 212; 1937, P. 223; *Grein* v. *Imperial Airways; Westminster Bank* v. *Imperial Airways.*

[4] "Internal" is a misleading term as it covers many carriages between different countries. "Conventional" and "non-conventional" would have been better terms, since the distinction is between carriages covered by the convention and those which are not.

The Orders in Council made under this Act specify in one column the titles of the High Contracting Parties (viz. His Majesty the King of Great Britain, &c.: the President of the French Republic); in the next column the territories in respect of which they are parties to the convention,[1] and in the third column the date as from which the convention came into force in each particular territory.

The first question which arose in this case was whether these Orders in Council were the *only* evidence which an English court could receive as to what territories were territories of a High Contracting Party for the purposes of the definition, (*a*) when the point arose on the application of the Act; (*b*) when the point arose on the construction of a contract of carriage (governed by English law or a foreign law).

Only Clauson L.J. seemed to make any distinction between (*a*) and (*b*), and it is submitted that no such distinction can be made. If the carriage is international, one set of conditions applies under the contract, and the Act which makes these conditions statutory applies, so that the parties have no freedom to depart from them: the definition adopted by the Act and made compulsory for the contract, is the same. How could a carriage be international for the purposes of the contract and not for the Act, and how should evidence be allowed for one purpose different from that allowed for the other? Nor, it is submitted, can it make any difference what law governs the contract since the Act makes the same conditions obligatory for all "international carriage" whatever law is the proper law of the contract; and, as Greene L.J. in *Grein*'s case explained, it was one of the principal purposes of the Warsaw Convention to make the same conditions apply to all carriages covered by the convention, whatever was the law which would govern the transaction.

Porter J. and Greer L.J. held that the Order in Council was the only evidence which the court could receive to determine which territories were territories of a High Contracting Party. Slesser L.J. (and s.c. Clauson L.J. as regards the construction of contracts) held that the Orders in Council were conclusive evidence that scheduled High Contracting Parties and territories were bound by the convention at the time the Order was made but not conclusive that non-scheduled powers and territories were not bound by the convention, and it was therefore possible for the court to hold on other evidence and the construction of the definition that other (non-scheduled) powers and territories were covered by the definition. According to the *Times Law Report*, he also said that the Order in Council was not conclusive that a power was not a party before the scheduled date, but it is submitted that as the Orders specify the dates as from which a territory became bound, it is doubtful if this can be right. He might, however, have questioned whether the Order was conclusive evidence that a territory was still bound since the convention might have been denounced since the last Order was made.

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[1] Viz. His Majesty became a party in respect of the United Kingdom at one date and in respect of other parts of the Empire at various other dates, and the position is the same in the case of other powers having overseas territories and possessions.

Though the question is clearly a doubtful one, it would seem that the view of Greer L.J. and Porter J. is more in accordance with the manner in which provisions in an English Act of Parliament such as section 1 (2) are generally construed by the courts. The view enunciated by these judges appears to correspond with the intention of the provision, which probably was to leave to the executive on the advice of the Foreign Office (which has the best information as regards ratifications and accessions and colonial extensions and denunciations by the various powers, as well as familiarity with the interpretation of the conventional provisions on this point) the sole responsibility for informing the courts, and to avoid the necessity of the courts having to deal with questions such as that discussed immediately below.

Since the Orders in Council state the dates as from which each territory became bound by the convention, there is no reason why they should not be satisfactory as exclusive evidence to enable the courts to fulfil the international obligation to apply the convention in all cases where it should be applied, provided that they are brought up to date with reasonable frequency and also state the date as from which a denunciation became operative.

There remains the question, what is the meaning of "High Contracting Party" in the Warsaw definition, and whether it is for the courts to determine this or for those responsible for the making of the Order in Council. It is clear that a signatory who has ratified is a High Contracting Party, but there was discussion in this case whether (1) an acceding country, and (2) a signatory which had not ratified (viz. Belgium), was a High Contracting Party. There should not have been any doubt about either of these points; the Court of Appeal (and Porter J.) held that an acceding country was a High Contracting Party and the Court of Appeal held that a signatory which had not ratified was not a High Contracting Party. Porter J., however, thought the contrary on the second point, being misled apparently by the wording of two articles in the convention: (*a*) the article which said that the convention should come into force when five High Contracting Parties had ratified; (*b*) the article which said that a High Contracting Party might, at the time of *signature*, ratification, or accession declare that the convention did not apply to his colonies, &c. The wording of these articles, he thought, showed that a signatory was a High Contracting Party. A signatory who has not ratified is not bound, and there is no doubt that 'High Contracting Party' means a party who is bound by the convention and every party who is bound is a High Contracting Party. The wording of articles such as those referred to by Porter J. has not caused any difficulty in international relations, and can be justified by the explanation that the declaration made at the time of signature only becomes effective after ratification.

There are three more cases this year dealing with obligations to pay money under bonds or debentures, one of them is a gold clause case, and all of them raise the question as to what law governs the obligations of the debtor to pay, with particular reference to legislation modifying the obligations prescribed in the contract.[1]

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[1] There is, in fact, also a fourth case—*Ottoman Bank of Nicosia* v. *Chakarian* (54 T.L.R. 122)—a decision by the Privy Council in a suit on a contract to pay a pension; the contract was governed by Turkish law and the place of payment was Cyprus. The question was whether the pound which was the unit by which the amount of pensions was calculated was a Turkish gold pound or Turkish paper pound. There was no gold clause, but it was argued that there was a course of conduct from which gold should be implied. The decision was against gold, but the case is not of general legal interest. In fact there were already two conflicting decisions of the Privy Council on the same question—*Ottoman Bank of Nicosia* v. *Dascalopoulos* ([1934] A.C. 354) and *Ottoman Bank* v. *Chakarian* ([1930] A.C. 277). The 1937 decision follows the 1930 decision and disapproves the 1934 decision.

In the 1937 volume of the *Year Book* at pp. 218–21, in a discussion of the English cases of the previous three years on this question, the writer formulated, under four headings, his views of the conclusions to be drawn from them. There is only space here to consider these two new decisions in the light of those conclusions.

One of these cases—*Mount Albert Borough Council* v. *Australasian Temperance, &c., Society*, 54 T.L.R. 5 (Case No. 11)—is a decision of the Privy Council delivered by Lord Wright, on appeal from the Supreme Court of New Zealand. It dealt with an obligation to pay interest on debentures secured on land in New Zealand issued by a New Zealand municipality, payment having to be made in Melbourne. The proper law of the contract was New Zealand law. A statute of the State of Victoria (The Financial Emergency Acts, 1931–2) provided for the reduction of the rates of interest on mortgages and other securities, and the question was whether the interest payments under these debentures were affected by this statute. It was held that they were not, on the ground that the Victorian Acts passed for the relief of internal and not foreign debtors did not purport to apply to mortgages by foreign corporations on foreign land governed by a foreign law. There are, however, further passages in the judgment showing that, even if the Victorian Acts did as a matter of Victorian law apply, the Privy Council would have held that a New Zealand court (or any court outside Victoria) should not regard them as applicable, because the proper law was New Zealand law which determined all questions relating to the substance of the obligation as opposed to "performance", and the Victorian statute was directed to the substance of the obligation, and Victorian law as the *lex loci solutionis* would not be applicable to vary the amount of the debt which should be paid. The case, therefore, raises the difficult question, what is the effect of the *lex loci solutionis* where it is different from the proper law. This question is discussed in (4) of the conclusions in the 1937 volume. As there stated it is clear that the *lex loci solutionis* will be recognized as affecting the rights of the parties as determined by the contract and its proper law, in so far as it renders performance *illegal or impossible*. It is also clear that the *lex loci solutionis* fixes what is legal tender for the discharge of the debt, but the question remains how much must be paid in this legal tender and whether this law must also be recognized in so far as it purports to make a payment of less than the value of the debt (under the contract and its proper law) a discharge. It was suggested in the 1937 volume that the law of the place of payment must be recognized as governing "the whole question as to what must be paid to discharge the debt", and that, where the law of the place of payment is different from the proper law of the contract generally, the contract must be deemed to have two proper laws—the law of the place of payment being the proper law for that part of the contract which relates to payment in that country.

It was there stated that in the *Adelaide Electric Supply Co.* case, where there was an obligation to pay money in pounds and the proper law of the contract was English, and the place of payment was Australia and where, in consequence (on the assumption which some of the Lords accepted, that the Australian pound was to be regarded as a unit of account as legally different from the English pound as it was in fact different), the unit of account which fixed the value of the debt was the English pound, all the Law Lords agreed that the debt could be discharged by payment in Australia of a number of Australian pounds equal in number to the number of English pounds due under the contract, although the Australian pound had a lower value than the English pound. The debt could clearly be discharged in Australia in Australian pounds, but it was not illegal or impossible to pay in Australia a number of Australian pounds equal in value to the contract number of English pounds, and therefore the *lex loci solutionis* had been recognized as reducing the value of the debt as fixed by the proper law of the contract.

Lord Justice Greer in the *New Brunswick Railway Company* case (see below) interprets the effect of the *Adelaide* case in this way and states that he could not reconcile these further passages of the *Mount Albert Borough Council* case with the *Adelaide* case.

Lord Wright said in the *Mount Albert* case that "The House of Lords in the *Adelaide* case was not concerned . . . with questions of the substance of the obligation which in general is fixed by the proper law of the contract . . . but only with performance of that obligation with regard to the particular matter of the currency in which payment was to be made. There was no question such as a reduction in the amount of the debt or liability or other change in the contractual obligation". It is submitted that this description of the *Adelaide* decision is not quite clear, but in the immediately following case Lord Wright gives a much more lucid explanation of the *Adelaide* case.

Case No. 12, *Auckland Corporation* v. *Alliance Assurance Company*, [1937] A.C. 587, is a decision of the Privy Council also delivered by Lord Wright on appeal from New Zealand, and purports to follow the *Adelaide* case exactly.

A debenture issued in 1920 by a New Zealand municipality secured on property in New Zealand provided for payment of interest in "pounds" at the option of the holder (which was exercised) in London. The proper law of the contract was New Zealand law. There had been a slight exchange difference to the disadvantage of the New Zealand pound between the New Zealand pound and the English pound prior to 1920, and this difference became pronounced afterwards.

Held that the debenture in defining the obligation to pay in "pounds" meant the "common unit of account current in Great Britain and the various parts of the British Empire" and that the debenture did not mean to specify the value of the obligation further, but was content to leave the exact value of what should be paid to discharge the obligation to pay "five pounds" to be determined by the value of the pounds in currency at the place of payment at the relevant time; and consequently when payment was to be made in England five pounds sterling was payable.

There is no conflict between this case and the *Mount Albert* case because of the finding that the debenture left the exact value of the debt to be determined by the value of the pound of the place of payment. Lord Wright states that this is what the House of Lords also decided in the case of the contract in the *Adelaide* case. As to this, it is permissible to remark that, in the *Adelaide* case, there were five judgments and in none of them is the true explanation (and it is an attractive explanation) of the decision so clearly and concisely stated in this sense, and the English Court of Appeal had failed, as well as the writer, correctly to understand it.

The third of these cases—*British and French Trust Corporation, Ltd.* v. *New Brunswick Railway Co.*, 54 T.L.R. 172 (Case No. 13) is a decision of the Court of Appeal reversing a decision of Hilbery J. in a case of which the facts are fully set out in the 1937 volume, p. 210, as well as the reasoning of the judge. It is only necessary to say here that the action was on a debenture containing a gold clause: that English law was the law of the place of payment: and that the *lex loci contractus* was Canadian. The Court of Appeal had to deal with a point not raised before Hilbery J., namely, whether Canadian legislation striking down "any gold clause obligation governed by the law of Canada" applied to this debenture. It was held by all three Lords Justices that it did not. Scott L.J. held that the proper law of the contract in general was Canadian law, but that the contract had two proper laws and English law was the proper law in all that related to payment. The gold clause belonged to the part of the contract which was subject to English law, and therefore Canadian legislation did not apply to it.[1] Slesser L.J. apparently took the same view. In so far as Scott and Slesser L.JJ. here held that, even though Canadian law was the proper law of the contract in general, yet English law, the law of the place of payment, must also apply to determine what payment would operate to discharge the obligation resulting from the contract, it accords entirely with the views expressed by the writer in 1937 and referred to above, though of course this was a finding with regard to this particular contract and neither Lord Justice said that there was a general principle to this effect.

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[1] This reasoning is interesting. It does not accord with (3) of the conclusions in the 1937 volume, according to which, if Canadian law was the proper law of the contract generally, the Canadian legislation striking down the gold clause would apply. There is, both in logic and authority, a good deal to be said for either view and it is clear that the law is far from settled on this point.

Greer L.J. (without deciding what law was the proper law of the contract as a whole) held that English law as the law of the place of payment must apply as regards all that related to payment.

Scott L.J. had difficulty in reconciling his decision with the (obiter) passages of the *Mount Albert* case referred to above. Greer L.J. did not attempt to do so.

On the question whether the gold clause was a *gold value* clause or a clause providing for payment in gold coin, a question depending on the interpretation of the provisions of the contract in the light of its proper law, Hilbery J. held it provided for payment in gold coin because that was what the words of the contract said, and such an interpretation involved no contradiction between different clauses and it was not impossible that the parties should have meant this in 1884 when the contract was concluded. The Court of Appeal overruled this decision on the ground (foreshadowed on p. 219 of the 1937 volume) that the decision of the House of Lords in the *Feist* case must be regarded as a legal ruling on the interpretation of gold clauses generally.[1]

There are two decisions, both of the Court of Appeal, dealing with "forum conveniens" which is the question which arises when leave to serve process out of the jurisdiction is sought, and the case comes within the Rules (Order 11, rule 1 of the R.S.C.) and the court has a discretion to grant or refuse leave.

In the first, *Kroch* v. *Russell and others*, 156 L.T. 379 (C.A.) (Case No. 14), the plaintiff wished to bring an action in England against the proprietors of a Belgian and of a French newspaper in respect of alleged libels upon his reputation contained in numbers of these two papers, of which only a few copies had been circulated in England, though both papers had a large circulation in their own countries. In order to bring his action it was necessary for him to obtain leave to serve notices of the writs abroad at the offices of the papers since neither of the defendants, who were a "société des personnes à responsabilité limitée" and a "société en commandite par actions" respectively, maintained any office in this country. The plaintiff could show that the case was one where the court *could* grant this leave, because the action was founded on an alleged tort (libel) committed in this country (some numbers of the papers having been circulated here), but the court has a discretion to refuse to grant leave if it considers that the action is not one which should be tried here, because (*inter alia*) it can more properly be tried elsewhere (*forum conveniens*). The Master in Chambers gave leave and the Judge in Chambers declined to set aside the Master's order. The Court of Appeal, however, held that leave should not be granted and set aside the order, because the English courts were not the *forum conveniens*, seeing that (1) the publications of the libel in England were small and those abroad extensive; (2) the plaintiff was a foreigner not resident in England and unknown in England; (3) the libels were connected with proceedings abroad for "sharepushing" and the evidence could be dealt with more easily by a foreign court.

The case shows that the Court of Appeal were unwilling to assist this attempt by the plaintiff in connexion with an essentially foreign matter to get the benefit of the stricter English rules with regard to libel and the high damages obtainable.

In the second case (Case No. 15, *Oppenheimer* v. *Rosethal and Co.*, 1 All Eng. 23), the plaintiff, a German national of Jewish faith, was bringing an action for wrongful dismissal against the defendants, a German company for whom he had managed the company's London branch. The contract of employment was made in Germany and governed by German law. The dismissal was effected by a letter signed in Germany but posted in London to the plaintiff by an agent of the defendants. The plaintiff contended (1) that the dismissal (the breach of contract complained of) was committed in London; that even if the cases are correct which decide that the breach takes place where the party evinces his intention to break the contract and, where this is by letter, at the place where the letter is posted even if the letter is not received, yet here the letter was posted in London and, up till the moment the agent posted it, no irrevocable step had been taken. If this contention was correct it brought the case within the rules:

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[1] The Court of Appeal also overruled the decision of the trial judge that the defendant company were not estopped from contending that the gold clause was not a gold value clause because in an action on another bond they had allowed to go against them by default a judgment containing a declaration to the effect that the clause was a gold value clause. Hilbery J. held that each bond was a separate contract creating a separate cause of action and therefore the plea of *res judicata* could not be raised here. The Court of Appeal held that the plea of *res judicata* could be successfully raised where the question to be decided was the same even if there were two separate causes of action.

(2) That England was the *forum conveniens* in spite of the fact that the contract was governed by German law, because the plaintiff being a Jew could not get a fair trial in Germany since, if he went there personally, his liberty would be in danger and he might not be allowed to have an advocate to plead his case.

The Court of Appeal accepted the contentions of the plaintiff and overruled the Judge in Chambers, who had decided that the order for leave to serve the notice of writ in Germany should be set aside.

DECISIONS OF AMERICAN COURTS

EFFECT OF RUSSIAN CONFISCATION DECREES IN THE UNITED STATES

IN *United States* v. *Belmont, et al.* (301 U.S. 344) the Supreme Court on May 3, 1937, reversed a judgment of the Federal Circuit Court of Appeals which had held that American courts were not bound to give effect to a decree of the Government of Soviet Russia purporting to confiscate Russian-owned property located in the United States.[1] Under an executive agreement between the United States and the Russian Government of November 16, 1933, by which the United States had recognized the Soviet Government, the latter assigned to the Government of the United States all sums of money due to the Russian Government from American nationals, corporations, and companies. Assumed to have been included in the assets confiscated were certain deposits made by a Russian corporation before 1918 with August Belmont, a banker in New York City. The United States claiming the deposits as assignee under the agreement of 1933 brought suit against the defendants for the recovery of the said sums so deposited. The Circuit Court of Appeals affirmed a judgment of the District Court dismissing the complaint, on the ground that the property in question being situated within the United States the decree of confiscation was ineffective in the sense that American courts had jurisdiction to enforce it. It was otherwise, however, with property situated in Russia. The lower court emphasized that the confiscation of property within the United States is precluded by the Fifth Amendment to the Constitution and this, it added, was also the policy of the State of New York whose law rather than Federal law governed the issue.

Upon appeal to the Supreme Court, this judgment was, as stated above, reversed. The Supreme Court disregarded the distinction made by the Circuit Court of Appeals between the effect of a confiscatory decree on property situated within the jurisdiction of the confiscating state and that situated outside its jurisdiction. In support of its decision it cited the cases of *Oetjen* v. *The Central Leather Company* (246 U.S. 297) and *Luther* v. *Sagor* ([1921] 3 K.B. 532), where it was affirmed that the courts of one sovereign state will not sit in judgment on the acts of another done within its territory and that recognition by a foreign government operates retroactively to validate all its acts from the commencement of its existence. As to the effect of the Fifth Amendment to the Federal Constitution, the Supreme Court declared that it prohibited only the confiscation of the property of American citizens and therefore had no extra-territorial operation except in respect to them.

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[1] See note in the *Year Book* for 1936, p. 196.

EFFECT OF FOREIGN DECREE OF CONFISCATION IN THE UNITED STATES

Immunity of Government-Owned Ships from Jurisdiction of Foreign Courts. In the case of the Spanish steamship *Navemar* the United States Circuit Court of Appeals (90 F., 2nd, 673) had before it in June 1937 a question somewhat analogous to that involved in the *Belmont* case (*supra*), namely, the legal effect in the United States of a foreign decree of confiscation, the property involved in this case being a ship in an American port; unlike the property involved in the *Belmont* case the ship was not situated in the United States at the time of confiscation in pursuance of the foreign decree. The *Navemar* was owned by a Spanish corporation and in October 1937 while in the port of Buenos Aires it was taken possession of in the name of the Republic of Spain, in pursuance of a decree issued by the Spanish Government. Later, while unloading its cargo in the port of New York, the former owners filed a libel in the United States District Court to recover possession, on the ground that the confiscation decree of the Spanish Government should not be given effect in New York. The Federal District Judge declined to give effect to the decree, but upon appeal his decision was reversed by the Circuit Court of Appeals on the ground that the ship being constructively a part of the territory whose flag it flies it was subject to the jurisdiction of the Spanish State, that the confiscation had taken place not in the United States but in the Argentine whose government had recognized the change of ownership, that the right of the Government of Spain to issue the decree confiscating it could not be questioned by the courts of the United States, and that the Spanish ambassador to the United States having claimed, on behalf of his government, title to the vessel and its immunity from judicial process, a court of the United States could not, under the decision in the case of the *Schooner Exchange* v. *McFadden* and other well settled precedents, take jurisdiction of the action which had been instituted for its recovery. The fact that it was employed by the Spanish Government for commercial purposes did not alter the situation. In these circumstances the court could not refuse to give effect to the decree.

NON-APPLICABILITY OF AMERICAN STATE STATUTE OF LIMITATIONS TO FOREIGN SOVEREIGNS

In *Guaranty Trust Company of New York* v. *United States of America*, decided August 16, 1937, the Federal Circuit Court of Appeals (91 Fed. Rep. (2nd) 898) was called on to decide still another somewhat similar question to that involved in the *Belmont* case (*supra*). In the latter case the question was whether the public policy of one of the states of the American Union in regard to the confiscation of private property could be invoked to defeat a claim of the United States as assignee of the Government of Soviet Russia under the Roosevelt-Litvinov agreement of November 16, 1933, by which the Russian Government assigned to the United States all its claims against American nationals. In the present case the question was whether a statute of limitations passed by the same state (New York) could be invoked for the same purpose. In both cases the Government of the United States was suing a New York bank to recover the balance of a certain deposit which the Russian Government had opened in the bank and which the United States claimed as belonging to it in virtue of the assignment agreement mentioned above. In the present case the deposit had been made by the Russian Imperial Government in 1916, and at the time the action was brought against the bank the balance of the account amounted to nearly $5,000,000. The bank pleaded in bar of the claim the New York State statute of limitations under which, it was alleged, the right of action had become outlawed. It was well settled by the precedents that a state statute of limitations does not run against the United States. But the question whether such a statute could be invoked against the claim of a foreign government had never been decided. The Supreme Court, had, however, affirmed it to be a principle of public policy that public rights or interests can never be lost or curtailed by the failure of public servants to assert them promptly (*French Republic* v. *Saratoga Vichy Spring Co.* (191 U.S., 427)). This principle was reaffirmed in the present case by the Circuit Court of Appeals, which declared that "the principle that a sovereign ought not to suffer from the negligence of his officers and servants" could not be abrogated by the legislation of one of the states of the American Union either in respect to the United States or to a foreign sovereign. If that were permissible it would mean that a local government could impose on a foreign sovereign a vicarious responsibility for the negligence of its agents in not bringing its suits promptly. Since it was admitted that such legislation could not be applied to the United States, to hold that it could be invoked against the right of a foreign state to sue in the courts of one of the United States would be to affirm that a foreign state has less than full sovereign rights in the United States in matters of international relations over which the Government of the United States has complete control. It was admitted that a foreign state must, like other litigants, comply with the procedural rules of the forum, for example, in respect to furnishing security for costs, submitting to counterclaims, &c., but these were matters of procedure which a foreign sovereign is required to comply with *after* it has sought the aid of the Court, and they must be differentiated from a requirement such as that involved by a statute of limitations which charges a sovereign with responsibility for something that occurred *before* he has sought the aid of the Court, in this case it being the failure of his agents to seek such aid more promptly.

The conclusion of the whole matter was that a foreign sovereign cannot be bound by a statute of limitations passed by one of the states of the Union when such statute cannot apply to the United States, and that, as the assignee of the Soviet Government, it was therefore entitled to the balance of the Russian desposit with the Guaranty Trust Co. free of any disabilities imposed by the said statute of limitations.

Postponement of Return of German Property Seized under Trading with Enemy Act

In the case of *Cummings, Attorney General* v. *Deutsche Bank und Discontogesellschaft* (300 U.S. 115) the United States Supreme Court on February 1, 1937, sustained the constitutionality of a resolution of Congress providing that the delivery to German claimants of all money or property which had been seized in the United States in pursuance of the Trading with the Enemy Act passed during the World War, and which had not been returned to the owners under the

Settlement of War Claims Act of 1928 should, in consequence of Germany's default in 1934 upon payments due to American citizens under the Debt Funding Agreement of 1930 with Germany, be postponed so long as these sums remained unpaid.

Under the Act of 1928 the United States agreed to return immediately to its owners 80 per cent. of alien enemy property sequestrated during the World War, the other 20 per cent. to be withheld temporarily and in the meantime to be distributed among American claimants against Germany. The portion of the 80 per cent. assignment which had not been returned to its former German owners at the time of the passing of the postponement resolution in 1934 was, it may be remarked, relatively small. The District of Columbia Court of Appeals held that the German claimants had a legal right to the unreturned amounts, and this right Congress could not impair by the resolution of postponement. This view was, however, overruled by the Supreme Court, which held that the title to all property seized in pursuance of the Trading with the Enemy legislation and which had not been returned to its former owners was vested in the United States and no longer remained in its former owners, that the Settlement Act providing for its return was purely an act of grace which did not divest the United States of the title which it had acquired to such property, and that therefore the resolution of Congress providing for the postponement of the return of the undelivered portion was not a deprivation of private property without due process of law in contravention of the Fifth Amendment.

James W. Garner.

REVIEWS OF BOOKS

Académie de Droit International: Recueil des Cours, 1936. Vols. 55–8 of the series. Paris: Sirey. 2,866 pp.

In Vol. I of the *Recueil* for 1936 most of the courses are on topics off the main line of international law. M. de Leener (*Règles générales du droit des communications internationales*) and M. Moresco (*Les Rapports de droit public entre la métropole et les colonies*) think that in the sphere of international communications and of colonial administration respectively there have been clear signs of progress from privilege to liberty. M. Ancel's essay in political geography (*Les Frontières, étude de géographie politique*) contains some interesting pages upon the growth of the idea of Germany as nation and as Empire. M. Bühler (*Les Accords internationaux concernant la double imposition et l'évasion fiscale*) traces the first slow steps towards what he calls "le droit fiscal international". M. Bruel (*Les Détroits danois au point de vue du droit international*) suggests that to protect her neutrality Denmark should conclude special conventions empowering her to close her straits to warships in time of war. More general courses are those of M. Scelle (*Théorie et pratique de la fonction exécutive en droit international*), who makes the point that a real international system would imply the principle of intervention rather than that of non-intervention; and of Baron Nolde (*La Codification du droit international privé*), who examines critically some methods of national codification of private international law.

From the paper by M. Witenberg which opens Vol. II (*La Théorie des preuves devant les juridictions internationales*) English readers will learn that, though arbitrators have been careful to reject technicalities of municipal systems, especially those involved in trial by jury, international practice in the matter of proof has many points in common with the English law of evidence. M. Hammarskjöld (*Les Immunités des personnes investies de fonctions internationales*) lectured on a topic with which he was eminently qualified to deal; and M. Mirkine-Guetzevitch's subject is one which he has made his own (*La Technique parlementaire des relations internationales*). Baron von Freytagh-Loringhoven (*Les Ententes régionales*) argues that most regional pacts, except those to which Germany is a party, are inconsistent with Article 21 of the Covenant as being either not regional or (because aimed at maintaining the *status quo*) not conducive to peace. The remaining three courses by M. Musy (*Les Bases de l'organisation économique de l'Europe*), M. Canina (*Le "Gold Standard" et son avenir dans les rapports internationaux*), and M. Vitta (*La Coopération internationale en matière d'agriculture*) are interesting discussions of the financial, commercial, and agricultural crises which have afflicted the world since 1918.

The gradual assimilation of the procedure in the advisory jurisdiction of the Permanent Court on "disputes" to that in contentious matters is traced by M. Negulesco in Vol. III (*L'Évolution de la procédure des avis consultatifs de la Cour permanente de justice internationale*); and Mr. Hindmarsh (*Le Japon et la paix en Asie*) sketches the historical background to present events in the Far East. M. Lewald and M. Balogh apply the comparative method to private international law. The former (*Le Contrôle des cours suprêmes sur l'application des lois étrangères*) urges that supreme courts should not be content to consider whether inferior courts have chosen the appropriate system of private law, but should go on to examine whether it has been correctly applied. The latter (*Le Rôle du droit comparé dans le droit international privé*) finds in comparative law the only remedy for the excessive abstraction which, he holds, is a feature of most discussions of private international law.

The remainder of Vol. III and the whole of Vol. IV are given up to two general courses in private and two in public international law. While M. Maury and M. Ago differ as to the value of the "reception theory" of private international law, they agree in rejecting the "comparative" or "jurisprudential" solution of the problem of qualifications, and in regarding *renvoi* as a matter of expediency rather than of principle. Professor Brierly and M. Basdevant give admirably lucid and reasonable surveys of the field of public international law. Professor Brierly accords to natural law a greater share in legal growth than does M. Basdevant, but both approach the problems of the day with a full sense of actualities. Perhaps M. Basdevant is unduly pessimistic about the Permanent Court, but those who believe that all international lawyers are blind to psychological factors and have no eye for anything but "lawyers' law" will find ample proof to the contrary in these lectures.

J. W. J.

Henry Wheaton, 1785–1848. By Elizabeth Feaster Baker. University of Pennsylvania Press. Philadelphia, 1937. 425 pp.

This book is of particular interest as being the first full-length biography ever published of that great international lawyer, Henry Wheaton, whose *Elements of International Law* has for a century been regarded as one of the highest authorities on the Law of Nations. Wheaton's first editor, William Beach Lawrence, prefaced his edition of this work, published in London in 1863, with a "Note of the Author by the Editor", and this has until now been the only account of Wheaton which was at all comprehensive, though a good short study by James Brown Scott appears in Vol. III of *Great American Lawyers.* The present volume therefore supplies a real need.

The authoress is to be congratulated on producing a scholarly and well-documented biography. At times the reader may feel a trifle lost in documents and details, and disappointed that more attempt is not made at a characterization of Wheaton, the man, who seems to be always in hiding behind his dispatches and his literary works. Towards the end, however, we learn the reason. Wheaton's whole greatness lay in these productions of his splendid intellect. In the practical sphere, frustration dogged his footsteps. Disqualification from practice at the New York bar, loss after expensive litigation of the copyright of his works as a reporter, failure of ratification of the treaty on which he had spent eight years of his diplomatic career, recall from his post for political reasons in a most inconsiderate manner—these were the circumstances of which he was at one time or another the unwilling victim; and it seems that only in the world of study and scholarship did he rise above them.

Much of Wheaton's later life was spent in Europe, where he was chargé d'affaires of the United States to Denmark, and then minister to Prussia. Many pages of the book are devoted to these years, and though largely dealing with the negotiation of the treaty between the United States and the Zollverein or German Customs Union (which afterwards failed to obtain ratification by the United States Senate) they give an interesting sidelight on contemporary

European history. Wheaton's reputation was much higher on the Continent and in England than in America. We find him received with deference by Lord Aberdeen and Sir Robert Peel on his visits to London, and in Paris, where his family lived for several years, he became friendly with Thiers and Guizot, and had several conversations with King Louis Philippe. The King's comment to Wheaton at one of these audiences on the inability of democracies to deal with sudden diplomatic crises (recorded on p. 205) is interesting and in some measure prophetic. "Yes", said the King, "they start up from under the ground when we least expect them, and what can diplomacy do when its most deliberate acts must pass in review before popular assemblies, and be torn in pieces by a parcel of scoundrelly deputies, and the peace of the world be compromised by men who have nothing to lose."

Misfortunes conspired to mar Wheaton's achievements in the eyes of his countrymen even after his death. As a result of differences of opinion between his family and W. B. Lawrence, his first editor, no new edition of the *Elements of International Law* has been published in the United States since R. H. Dana's edition of 1866. It is this edition which has recently been reproduced in the Carnegie "Classics of International Law" series. There is no doubt that this reproduction and the timely appearance of the biography now under review will combine to make the work of this great American more known and appreciated by his fellow citizens of this generation; and the English reader will also be grateful for such a competent study of one of his own race "whose influence for peace and goodwill has extended throughout the entire world".

S. H. B.

The Legal Position of War: Changes in its Practice and Theory from Plato to Vattel. By William Ballis, Ph.D. The Hague: Martinus Nijhoff, 1937. xi+188 pp. (4 guilders).

This is a study of the *jus ad bellum* from classical times to the end of the eighteenth century. The questions with which it deals are stated by the author as being:

"With whom may a state wage war?
"How must a state begin a war?
"What circumstances justify a war?
"Under what conditions is the state obliged to wage war? and
"When and where is a state obliged to refrain from waging war?"

The book consists mainly of a summary of the views on these subjects of various writers, including Plato, Aristotle, and Cicero for classical times, St. Augustine and other Churchmen for the Middle Ages; Machiavelli, Martin Luther, Erasmus, More, Bacon, Franciscus De Victoria, Ayala, Suarez, and Gentili for the Renaissance; and the international law writers from Grotius to Vattel for the seventeenth and eighteenth centuries. A useful collection of material, but not a profound work, and shows little evidence of original thought.

Les Organisations Ouvrières, leurs compétences et leur rôle dans la Société des Nations et notamment dans l'Organisation Internationale du Travail. By Alexandre Berenstein. Paris: Éditions A. Pedone.

Mr. Berenstein has written the fullest account which has yet been published of the role of workers' organizations in the International Labour Organization and of the extent to which they have acquired a status in the advisory bodies of the League of Nations and before the Permanent Court of International Justice. Though he is sometimes inclined to be slightly doctrinaire, he gives a reasonably full and very readable account of the questions which arise in connexion with the nomination of workers' delegates to the International Labour Conference, of the practice of the Conference when dealing with protests against the validity of the nomination of workers' delegates, of the manner in which the tripartite character of the Conference is emphasized in its Standing Orders, of the status of workers' members of the Governing Body of the International Labour Office, of the role of workers' organizations and representatives in connexion with the procedures of representation and complaint, and of similar topics. He is occasionally a severe critic of the makeshifts of practical life, but perhaps not always without some justice. His insistence that the immunities of members of the International Labour Conference should be regarded as of a parliamentary rather than of a diplomatic character (thereby giving members of the Conference a certain protection in their own countries) is particularly welcome, and his book must be regarded as a promising first contribution to the literature of international law.

C. W. J.

Fontes Juris Gentium. Edidit Viktor Bruns. Series B, Sectio I, Tomus 2. Digest of the Diplomatic Correspondence of the European States, 1871–8. Part I. 1937. Berlin: Carl Heymanns Verlag. xl+622 pp. (*RM.* 38.)

The plan of this monumental enterprise of the *Institut für ausländisches öffentliches Recht und Völkerrecht* was explained in a review which appeared in the *Year Book* of 1932. The present instalment is the first part of a volume which surveys the diplomatic correspondence of the period between the Peace of Frankfurt and the Treaty of Berlin, and comprises nine out of the twenty-one subject headings under which the material was arranged in the preceding volume, namely, Foundations of International Law, International Law and Municipal Law, Subjects, Juridical position of States, Nationality, Territory, Jurisdiction, Minorities, and Succession. No change has been made in the method or scope of the work, except that the extracts given are longer than those of Vol. I.

Folkerett. By Frede Castberg. 1937. Oslo: Christiansens boktrykkeri. 257 pp.

The author, who is professor of international law and legal adviser to the Norwegian Foreign Ministry, deals with both the international law of peace and that of war. Of special interest are the chapters concerning the responsibility of states, the rules of neutrality and proceedings before international courts and before international investigation and conciliation commissions.

It is highly desirable that an English translation of the essential chapters of this valuable publication should be prepared.

J. J.

Private International Law. By G. C. Cheshire, D.C.L., M.A. 2nd edition. 1938. Clarendon Press. lxxii+692 pp., including index. (25*s.*)

This edition is a worthy successor to the first one which appeared only three years ago to fill a gap in English legal literature.

The work is already regarded as something of a classic both at home and abroad, and it is with pleasure that we see it has been enlarged from 558 to 692 pages, and thoroughly brought up to date. Our only misgiving is that if the size of the book goes on increasing at this rate it will soon be as bulky as those other works that in becoming classics have almost ceased to be students' books. At its present size, however, the book is at once a weighty work of reference and an admirable book for students because of its comprehensiveness and its provocative freshness. It is not yet too big for students.

1. The problem of classifying a complex of facts containing a foreign element is now fully treated at pp. 24–5. We are inclined to agree that the *lex fori* should govern the primary classification of facts, e.g. whether a matter raises a question of capacity or of form. But we think that when this classification produces a reference to foreign law, then, as this is a question of fact (see pp. 129–30), it is no use trying to predict what the foreign court will do. The fact that in some cases "serious embarrassment may follow if the rights of parties are made to depend upon the current view of renvoi in the country of the domicil" (p. 65) seems to us to be irrelevant: the fact that foreign judicial interpretation under a codified system is more flexible than ours cannot be helped. It is not for us to say that because the courts of Ruritania have once given a judgment they will necessarily follow it the next time, any more than we can expect our own judges of first instance always to follow each other. Consequently, though we do not join in Dr. Cheshire's stricture on *Re Annesley*, [1926] Ch. 692, and *Re Ross*, [1930] 1 Ch. 377, we do in fact agree with the statements at pp. 39 and 40 that, "once . . . a foreign legal system is the appropriate law to govern the whole of a particular transaction, it is only logical to admit that the foreign law shall henceforth govern the matter in every respect".

2. At p. 39 it is pointed out that the Statute of Frauds "sometimes operates harshly" on a foreign plaintiff. We may, however, observe that if a plaintiff will merely take the trouble to sue in his own country where the statute does not operate, he should be able to enforce his foreign judgment here in one of the ways so well described in Chapter XVII. We suggest that if the means for the enforcement of foreign judgments were more used in practice, fewer problems of "classification" would arise.

3. Dr. Cheshire says he has abandoned Dicey's theory of "acquired rights" (pp. 85–91), but at p. 90 he says that it is the habit of English judges to seek a "just and convenient" solution of the problems coming before them, and so we do not think that Dr. Cheshire's new views lead to results that are substantially different from those produced by Dicey's theory, which is tempered by numerous exceptions contained in his second general principle.

4. In the chapter dealing with torts committed abroad it is suggested, at p. 305, that two Privy Council cases have the effect of over-ruling the decision in *Machado* v. *Fontes*, [1897] 2 Q.B. 231. This may be desirable, but all that we are prepared to say is that since *Kroch* v. *Rossell & Cie*, [1937] 1 All E.R. 725, in those cases where a foreign tort involves the service of notice of a writ abroad under *Order XI*, *r.1(ee)*, our courts will refuse to exercise their discretion to grant leave to serve in those cases where the tort has no substantial connexion with this country.

5. Dr. Cheshire does not think it desirable that the courts of the petitioner's residence should have jurisdiction in nullity of marriage (pp. 343 and 344), and therefore criticises the decision in *White* v. *White*, [1937] P. 111. We do not share

this view, because we think that all such a court does is to register the fact that a marriage has never existed. On the other hand, we note that Dr. Cheshire continues to accept what we personally consider to be the wholly illogical distinction between void and voidable marriages laid down in *Inverclyde* v. *Inverclyde*, [1931] P. 29.

6. We do not share Dr. Cheshire's dislike of the rule in *Vadala* v. *Lawes* (*p.v.*); since the statement made by the Court of Appeal in *Oppenheimer* v. *Louis Rosenthal*, [1937] 1 All. E.R. 23 (cited at pp. 112 and 114), we think that our courts will rightly retain the right to review a foreign judgment, even though "the conclusiveness of foreign judgments" is thereby impaired.

7. We note with gratitude that the present edition includes an improved account of the difficult topics of the assignment of choses in action and of the position of corporations, and now deals with the "Gold Clause" cases, although the decisions of the House of Lords in the *Cristina* and the other very recent cases raised by the Spanish and Abyssinian wars have been decided too late for inclusion.

In what we have just said it will be plain that we do not always agree with Dr. Cheshire's interpretation of some controversial points, but this should not obscure the fact that we are in substantial agreement with most of what the author says, and that we consider his book by far and away the most suitable book available to English students on this vital and fascinating subject. Every one, whether practitioner or student, concerned with conflict of laws owes a great debt of gratitude to Dr. Cheshire for having most efficiently re-written and brought his work up to date in a very short space of time. We prophesy that this book will go through many more editions, and we hope the hand of the master will be available to produce them.

B. A. WORTLEY.

The Settlement of Canadian-American Disputes. A Critical Study of Methods and Results. By P. E. Corbett, Dean of the Faculty of Law, McGill University. New Haven: Yale University Press, 1937. viii+130 pp. ($2.50.)

This volume is one of a series dealing with Canadian-American relations. The series owes its origin to discussions which took place in 1932 between a group of Americans and a group of Canadians, and which resulted in a decision to arrange for the preparation and ultimate publication of a series of studies covering the fields where the relations of the two peoples come in contact. The field was divided into sections dealing with history, economics, sociology, and political science and law. The various volumes are being published with the assistance of the Carnegie Endowment.

Canadian affairs have been a fertile source of international disputings between the Government of the United States and the Government responsible for the external relations of Canada. From the time of the recognition of the independence of the United States by the Treaty of Paris until the moment when the Dominion became responsible for the conduct of its own foreign relations, it was the Government in London which had to bear the brunt of those disagreements. Mr. Corbett, in this survey of the settlement of Canadian-American disputes, has very wisely included in the volume information as to the nature and the handling of these earlier disputes when the party concerned was the Government of the United Kingdom and not that of Canada.

The subject of the volume being the settlement of the various disputes that arose, not the disputes themselves, its contents consist almost entirely of a record of the various international arbitrations which have taken place. Questions which have been settled as the result of diplomatic discussion—such, for instance, as the agreement negotiated in 1908 between Mr. Bryce and Mr. Root re-defining by Article I the frontier between New Brunswick and the State of Maine in Passamaquoddy Bay—find no mention.

The various arbitrations are not dealt with successively in strict chronological sequence. They are dealt with in groups according to the subject-matter. The first chapter describes the various arbitrations dealing with disputes as to the Canadian-American frontier. The settlement of this frontier has involved no less than seven different arbitrations, beginning with that relating to the St. Croix river in 1798 and ending with the Alaska Arbitration in 1903. Another chapter is devoted to the various fishery arbitrations, and a third to the settlement of the disputes relating to inland waterways through the machinery set up by the Boundary Waters Treaty of 1909. There is also a chapter dealing with the numerous miscellaneous claims which have been submitted to arbitration either by the Claims Commission of 1853, or by the Pecuniary Claims Commission set up by the Agreement of 1910.

The cases described in this small book of 130 pages constitute a surprising volume of international litigation—made all the more surprising if one reflects that it deals only with the settlement of disputes affecting Canada or Canadians directly. No mention, for instance, is made of arbitrations between the United States of America and Great Britain which affected Canada or Canadians indirectly, such as the Alabama Arbitration, or the multitudinous claims dealt with under Article XII of the Treaty of Washington of 1871.

A foreign student of international affairs might assume that to render possible the arbitration of so many disputes the machinery in force between the two countries for the pacific settlement of international disputes must cover every kind of dispute and leave no loopholes to either government to refuse to arbitrate; yet the last chapter of Mr. Corbett's volume shows that as between Canada and the United States such machinery is very defective.

The book is well written and is admirably concise: as a ready source of information as to these numerous arbitrations, it will be of great value. C.

Die Rechtslage deutscher Staatsangehöriger im Ausland. By D. H. Emmerich and John Rothschild. H. D. Tjeenk Willink and Zoon, Haarlem, 1937.

This volume deals with one important aspect of private international law about which there is a scarcity of literature. Although the authors purport to examine solely the status of Germans abroad, many of their conclusions would apply equally to the nationals of other states. The authors have collected a vast quantity of the rules and regulations in force in the principal European countries governing a foreigner's proprietary rights, taxation, exchange, admission and residence, acquisition of nationality and extradition. The arrangements of the facts and statistics are accurately given and a clear comparison is made between the legislations reviewed. It is, however, to be regretted that the authors have confined themselves to a very sketchy examination of the reported cases. In a book of this character, a discussion of the more important cases decided by the municipal courts in the various countries would have proved of the greatest value. C. J. C.

Malaysia. A Study in Direct and Indirect Rule. By Rupert Emerson. New York: The Macmillan Company. xii+536 pp.

The author is Assistant Professor of Government in Harvard University, and the book is the outcome of a year's visit to the East to study on the spot the problems of government and administration presented by what the author compendiously calls "Malaysia"—that is to say on the British side, the Straits Settlements, the Federated Malay States, and the unfederated States (Johore, Trengganu, Kelantan, Kedah, and Perlis), and on the Dutch side, the whole of Netherlands India.

After a description of the consequences that result from the geographical position of the territories—placed athwart the route from Europe to the Far East—and from the welter of races they contain—European, Chinese, and Indian superimposed on the native Malay—a brief account is given of the rubber and tin industries which have brought prosperity to the Malay States, and a reasonably extensive explanation of the history of the European contact with Malaya. The author then proceeds to a detailed study of the system of government adopted in each of the many units which are comprised by his term "Malaysia". Unfortunately the author can see but little to admire in the efforts which have raised the Malay States and Netherlands India to their present levels of prosperity and advancement. They are characterized as imperialism and criticized as such. It will be a surprise to most readers of the book to learn (p. 519) that "only in the Soviet Union does there appear to be the realization of a program which involves on one side the full application to backward lands and peoples of the new scientific powers and on the other side the education and encouragement of the peoples themselves to take a full and equal share in these powers".

C.

The Mexican Claims Commissions 1923–1934. By A. H. Feller. New York: The Macmillan Co. 572 pp.

Mr. Feller, of the Attorney-General's Department of the United States, gives a comprehensive study of the series of Claims Commissions set up to determine claims by the U.S.A., Great Britain, France, Germany, Spain, and Italy respectively against Mexico. The conventions under which they worked and their rules of procedure are set out in appendices, and their history, procedure, and decisions are fully discussed. The author's conclusion, with which, when they have read the book few will wish to differ, is that "the proper forum for the adjudication of claims is not an evanescent tribunal but the Permanent Court of International Justice", and that if *ad hoc* bodies must be set up, almost any kind of tribunal is easier to work than an arbitral tribunal of two "national" members and a neutral chairman.

The contents of this work may be considered broadly as falling into two divisions: the former consisting of matter which is rather of particular than of general interest, and the latter where the reverse is the case. In the first division—about one half of the volume—we place the first five chapters dealing with international claims in Mexican history, Mexican revolutions of 1919–20 and the negotiation of the conventions, a survey of the organization and work of the commissions, and Chapters 8 and 11 to 13 which treat questions arising out of the particular provisions of the Mexican conventions or the peculiar circumstances connected with them.

In the remaining chapters—which discuss the decisions of the commission—considerations of general law predominate: the nationality of claims, responsibility of states for injuries to foreigners, contract claims, decisions on the Calvo clause, procedure, evidence, measure of damages, &c.

In reading these chapters and Mr. Feller's pertinent criticisms of the decisions, it is impossible not to feel how difficult the task of these commissions was. The law to be applied is pure judge-made law, made under conditions rendering it practically impossible to produce a logical set of rules and difficult even to apply any set of rules consistently. The reason for this is that the basis of all the rules is two main principles both of which are established in law and in practice and yet are mutually contradictory. The first is that individuals have no rights or duties under international law—the claim belongs to the state which is injured in the person of its national—leading to the conclusion that, though it is essential that the injured individual must have been a national of the claimant state, the reparation to be made is not necessarily (though it may be) measured by the damage the individual has suffered, and it is immaterial if he be dead whether he left heirs or who they may be. He has legally no interest in the claim.

The other principle proceeds on the footing that the object of the claim is to secure redress for the injured individual to whom or to whose heirs the money awarded will in reality go. Therefore his heirs, too, must be nationals of the claimant state and each portion of the sum awarded must be justified by some real or supposed loss or injury to the injured individual in whose name the claim is put forward or by a loss or injury to the heirs if the person originally wronged be dead. But the only satisfactory justification for many admitted heads of claim (e.g. failure to prosecute a person who has murdered a foreigner) is, as Mr. Feller says, quite a different one. It falls under the first principle, namely, that the respondent state has failed in the case in question, to the detriment of foreigners, in its international duty to ensure the functioning of its state institutions in the manner required by international law in the interests of general security, and should therefore make reparation, which is governed as much by the gravity of the failure as by the material damage actually caused to any individual.

While this conflict between the two basic principles of the law of international claims for injuries to foreigners remains, no completely logical set of rules can be built up. The drastic remedy of eliminating one of them is unlikely to be adopted and perhaps not altogether to be desired, because both have solid foundations in reality as well as in law. Judicial ingenuity—and the Mexican Commissioners did not fail to show it—may yet, by relying now on one principle and now on the other, produce a set of rules sufficiently fair and definite to meet the practical requirements of state intercourse, but much remains to be done and many passages in awards—including some Mexican awards—must be definitely placed upon the *index expurgatorius*.

E.

The Sources of Modern International Law. By George A. Finch, of the Carnegie Endowment for International Peace. Published by the Endowment. 1937. vii+124 pp.

This small volume is the first of a series of monographs to be published by the Carnegie Endowment at Washington. For some years past the author has lectured at the summer session for the teaching of international law at the

University of Michigan at Ann Arbor, on the Sources of International Law. He has published in the present volume the substance of his lectures as he gives them year by year. The lectures delivered at Ann Arbor are intended primarily for students, and this fact governs the scope of the book, but its value and utility will not be limited to students.

On no subject has there been greater confusion of thought than on the sources of international law, and the reason is that so many of the publicists have in their works advanced theories as to the nature and as to the foundation of international law which obliged them to use a word such as "sources" in the sense which was most consonant with the views they were advancing. Mr. Finch avoids this error: he is not out to dogmatize: he is out to teach students what others have proclaimed. For this purpose he gives a résumé of the views put forward by the various schools of thought, and the summary that he gives is clear and fair.

The book is divided into six chapters: the first deals with the factors which have contributed to the growth of international law, such as Roman law, the revival of trade in the Middle Ages, the old trading leagues, the development of maritime law, and such like. The second treats of natural law and the teaching of Pufendorf and his successors. It also describes the opposing theories of the positivists. The third chapter gives a short account of the chief modern writers on international law and of what they taught. The fourth is devoted to custom and the part which custom has played in the development of international law. Custom as a source of international law is much discussed, but unfortunately the word is used somewhat loosely by many writers, and the final word on this subject has not yet been written. The last two chapters deal with treaties and the decisions of international tribunals as sources of international law.

Mr. Finch's lectures must have been a great help to the students at Ann Arbor, and the publication of this monograph will now bring them before a wider audience.

C.

Gebietshoheit über die B und C Mandate. By W. Gaupp. Tübingen: J. C. B. Mohr, 1937. 63 pp. (2.50 *M.*)

This is yet another, and somewhat unusual, addition to the various theories as to the *situs* of sovereignty over the B. and C. mandated territories. The author's view is that the position is analogous to that created by the Treaty of Versailles with regard to the Saar Territory. This means that the sovereignty over the mandated territories in question has remained with Germany, while the exercise of sovereignty was given to the League of Nations which in turn has handed over that function to the mandatories and has supervised its execution. The author agrees that this conclusion cannot be directly deduced from the terms of Article 119 of the Treaty of Versailles and of Article 22 of the Covenant. But he maintains that the authors of the treaty did not intend a clear and definite regulation of the matter and that for this reason the phraseology of the treaty was left deliberately obscure. This being so, the author has no hesitation in invoking the maxim *obscuritas pacti nocet ei, qui apertius loqui potuit.* As the authors of the treaty were in a position to be more precise, they must now be prepared to accept the various unfavourable interpretations that may be put upon what the author believes to be the controversial terms of the treaty and of the Covenant.

H. L.

International Legislation. By Torsten Gihl, translated by S. J. Charleston. 1937. viii+158 pp. Oxford University Press: Humphrey Milford. (10*s.* 6*d.*)

This is a very carefully written essay covering both changes in the general rules of international law and what is commonly called the "problem of peaceful change", that is to say, the alteration of existing legal situations. Herr Gihl begins with a study of the general nature of international law, arriving at the conclusion that it is essentially a customary law. From this he passes on to an analysis of treaty legislation, the problem of settling legal disputes by extra-legal principles, the nature of political disputes, and the possibility of applying "equity" in their solution.

An exhaustive survey of the whole ground leads the author to the conclusion that there is no formal solution of the problem of change, assuming that the setting-up of a complete system of world government is ruled out as impracticable. The responsibility for achieving peaceful development is thus thrown back upon diplomacy, and no form of international machinery can be devised which will relieve diplomacy of this responsibility. In the author's own words:

> " 'International legislation' is not the business of courts but of states, and the states can develop new rules of international law by observing these rules in their actions without the support of any agreement, or they can also adjust their mutual relations by means of agreements, whose rules, certainly, are only binding upon the contracting parties, yet which, nevertheless, if they correspond to the demands of international life, will come to be applied also by states which have not subscribed to the agreement, and thus give rise to international customary law, which alone constitutes international law" (p. 151).

The essence of the matter is that all legislative change must be brought about either by authority or by agreement or by force. If no competent authority exists and none can be established, then agreement remains as the only peaceful method of effecting change. Stated thus shortly, this proposition may seem to be self-evident. Unfortunately, a large literature has grown up out of the many attempts to avoid its implications.

Herr Gihl's essay is published under the auspices of the Swedish Co-ordinating Committee for International Studies, and is presented to English readers in an acceptable translation.

H. A. S.

National Air-legislations and the Warsaw Convention. By Dr. D. Goedhuis. The Hague: Martinus Nijhoff. 360 pp. (Fl. 7.50.)

This book, by the manager of the Central Office of the International Air Traffic Association, is a valuable analysis of the provisions of the Warsaw Convention and a useful summary of municipal laws dealing with the liability of air carriers. Incidentally, it explains clearly some of the leading cases, such as *Aslan* v. *Imperial Airways Ltd.* (1933) and *Grein* v. *Imperial Airways Ltd.* (1936).

The Warsaw Convention, the purpose of which is to standardize the private international law of the air carriage of passengers and goods and to fix limits of liability, was signed on October 12, 1929. So far twenty-eight states have ratified or acceded to it, among them being Great Britain, all the Colonies, and the Dominions with the exception (as yet) of Canada, New Zealand, and South Africa. It applies only to international carriage, interpreted as carriage starting and ending in the territories of two contracting states, respectively, or in a single contracting state's territory if there is an agreed stopping place within a foreign state (whether a party or not).

The convention does not apply, therefore, to air carriage entirely within a participating state's jurisdiction. It is obviously convenient, however, that such carriage should be governed by the same rules as international carriage, and seven states (Italy, Belgium, the Netherlands, and Scandinavia) have in fact already applied the Warsaw rules to their internal carriage. Nine other countries are taking steps to follow their example. In Great Britain power has been taken, in section 4 of the Carriage by Air Act, 1932, to apply the rules in the convention to carriage which is not international; no Order in Council for this purpose has yet been made.

Dr. Goedhuis considers the convention unsatisfactory in various respects. It does not apply to charter journeys and a company could evade its obligations by employing a charterer as intermediary and excluding all liability in the charter contract. It makes an unjustifiable distinction between passengers and goods so far as liability for negligence in pilotage is concerned. It deprives an air carrier of limitation of liability if the documents of carriage for goods or baggage omit certain particulars; or if his agent, without his privity, has been guilty of wilful misconduct or equivalent default. In this last respect the provision in the Rome Convention, 1933, is to be preferred. Other valuable suggestions are also made for improving the convention.

J. M. Spaight.

Grundlagen und Methoden Internationaler Revision. By Werner Gramsch. (New Commonwealth Institut Monographien, Series B, No. 6.) Stuttgart-Berlin. Deutsche Verlags-Anstalt, 1937. 181 pp.

The book is in the main an attempt to develop a theory of international revision, to be applied to treaty relations as well as to situations resulting from customary law. The basis for the author's scheme is his analysis of legal concepts rather than an analysis of the practice of states. The available instances of treaty revision and of a revision of international situations, fairly numerous in the history of international law, are hardly touched upon.

One will find interesting Dr. Gramsch's remarks on the action of the League of Nations as a revising body under Articles 11 and 15 of the Covenant (pp. 133–6), and on the possible attribution of revising functions to international tribunals (pp. 148 *et seqq.*).

Benjamin Akzin.

Grotius Annuaire International pour l'Année 1937. The Hague: Martinus Nijhoff, 276 pp.

This publication, whose object is to give a yearly survey of the Netherlands' international activities, maintains its usual high standard. In addition to articles on special subjects, such as the measures taken to prevent theft in the course of river traffic, Dutch commercial policy, &c., there is an abundance of material specially interesting to international lawyers. This is particularly the case as regards the numerous questions that have arisen between the Netherlands and Germany, both in the diplomatic field and in that of private international law. In the latter connexion, several cases in the Dutch courts arising out of the

German anti-Semitic marriage laws are briefly, but cogently, discussed. The section dealing with the Netherlands' attitude to the League of Nations is full of valuable information, and shows the typical characteristics of the country: high ideals coupled with sturdy commonsense and passionate attachment to Dutch independence and neutrality.

A.P.F.

Transactions of the Grotius Society. Vol. 22. London. 149 pp. (10*s.*)

This little volume contains the papers read before the Society in the year 1936. These comprise: "The Outlook for the Law of War", by Professor J. W. Garner; "Some Legislative and Administrative Aspects of Article XVI of the Covenant", by Professor Phillips Bradley; "The Nature of International Law", by Professor A. L. Goodhart; "The Significance for International Law of the Tripartite Character of the I.L.O.", by C. Wilfred Jenks; "Comparative Law and its relations to International Law", by Professor Mario Sarfatti; "The New Soviet Constitution", by Dr. Samuel Dobrin; and "Historical Survey of the Application of Sanctions", by Dr. George de Fiedorowicz. Where there is so much of interest it is perhaps invidious to single out any one paper, but to the present writer Professor Goodhart's is particularly stimulating. He treats his subject with freshness and breadth, disposes convincingly of theoretical difficulties of the Austinian kind, and comes to the conclusion that the law of nations, like municipal law, ultimately rests upon the recognition by those concerned that it is necessary for their welfare and indeed their very existence.

A. P. F.

American Casebook Series: Cases on International Law. Shorter Selection. By Manley O. Hudson. West Publishing Co., St. Paul, Minn. xxxix+622 pp.

This is an abbreviated edition of Professor Hudson's well-known *Cases on International Law.* It is intended primarily for students with relatively little time to devote to the subject, but should prove to be of considerable utility to the practitioner also. It follows the general arrangement of the main work, the footnotes having been somewhat amplified, and, like the main work, contains a certain amount of material other than decided cases, such as conventions or draft conventions, national legislation, &c., which, if they do not create international law, may contain useful pointers to the law, or be declaratory of it.

Jahrbuch 1937 der Konsular Akademie zu Wien. Vienna. 133 pp.

This annual publication of the Vienna Consular Academy has already been reviewed in this *Year Book.* The present issue contains a number of interesting contributions; among these mention ought to be made of the papers of Herr Brandner on *Pacta contra bonos mores* in International Law; of Dr. Hohenwart on the Conception of Equity in International Law; and of Dr. Schlesinger on Article 19 of the Covenant. A number of papers are devoted to international relations and to economic questions.

Comparative Commentaries on Private International Law. By Arthur K. Kuhn. New York. The Macmillan Company, 1937. xii+381 pp. (£1 net.)

The object of these commentaries is "to present in a critical manner and within reasonable compass the legislation and jurisprudence of common law jurisdictions relating to private international law in parallel comparison with the principal systems of Europe and Latin America". Private international law from its very nature offers a fruitful subject for comparative study, but the information necessary for comparing the conflict of law rules of different countries is not always readily available, and the highly theoretical manner in which continental writers frequently approach the subject is apt to make it difficult for English and American lawyers to discover what are the rules actually applied by the courts of foreign countries. Mr. Kuhn's work, based as it is on a wide and accurate knowledge of foreign systems, should, therefore, be of great assistance to serious students of the subject. The commentaries are concerned with the rules which are to be found in the legislation and the decisions of the courts of the different countries, and a full treatment of the history and theory of private international law would not be within their scope. The brief account of the development of the subject, both on the Continent and in the common-law countries, is necessarily somewhat sketchy, and the suggestion on p. 29 that the late development of a common-law doctrine of private international law was due to the fact "that it was not until after the Revolution (1688) that any extensive mercantile relations were developed between England and the Continent of Europe" lacks historical foundation. The reason why the common-law courts were little concerned with questions of conflict of laws before the eighteenth century is to be found in the fact previously stated at p. 17, that questions connected with foreign trade were outside the common-law jurisdiction and were dealt with by the mercantile courts.

The Anglo-American theory of private international law is admirably analysed and contrasted with the international theory in the succeeding chapter on the General Nature and Scope of Private International Law.

The rest of the work consists of a comparative study of the whole field of private international law, subject by subject. The author's plan has been, first to state and discuss the common law on the subject, and then to compare the American and English solution with that of the principal continental countries. Of particular interest to English readers are the author's comments on the differences between the English and American conflict of law rules, which should prove very helpful in any critical study of English private international law.

D. J. Ll. D.

Oppenheim's International Law, Vol. I, Peace, 5th edition by H. Lauterpacht. Longmans, Green & Co. lvi+819 pp. (45*s*. net.)

This is the first volume of the fifth edition of *Oppenheim*, of which the second volume (*Disputes, War, and Neutrality*) has already appeared and was reviewed in the *Year Book* for 1936. It is scarcely necessary to repeat the observation then made that Professor Lauterpacht's name is in itself a guarantee of the merits of the new edition.

Although only ten years have elapsed since the last edition of *Oppenheim*, they have been years full of interest and moment in the practice of international law, and it was not, therefore, too soon for a new edition of a work, the nature and character of which has always made it a practitioner's rather than a student's textbook. It is nevertheless not the least of Professor Lauterpacht's services that he has considerably expanded the theoretical side of the book and has introduced new matter of great value in this connexion. It would be presumptuous either to criticize or to praise *Oppenheim*, but it may fairly be said without any reflection on the work as it left its author's hands that it has become, through successive editions, both better balanced and more complete.

The following list of new or mainly new sections will give some idea of the principal fresh material now introduced.

7 (The "Family of Nations" a Community), 13 *a* (Persons other than States as Subjects of International Law), 19 (General Principles of Law as a Source of International Law), 19 *a* (Decisions of Tribunals as a Source of International Law), 19 *b* (Writings of Authors as a Source of Law), 21 (International Law and Municipal Law. The Monistic Doctrine), 21 *a* (Law of Nations as part of Municipal Law), 29 *a* (Universal and Regional International Law), 29 *b* (So-called American International Law), 29 *c* (The so-called Anglo-American and Continental Schools of International Law), 29 *d* (National Conceptions of International Law), 33 (Codification in the period after the World War), 34 (Codification under the Auspices of the League of Nations), 35 (The Hague Codification Conference of 1930), 37 (The Limits and Prospects of the Codification of International Law), 37 *a* (International Legislation and the Revision of International Law), 59 (The Science of the Law of Nations in the Nineteenth and Twentieth Centuries), 70 (The Problem of Sovereignty in the Twentieth Century), 71 *a* (The Legal Nature of Recognition of States), 75 *bb* (The Legal Nature of Recognition of Governments), 75 *g* (Recognition of Insurgency), 75 *h* (Recognition of New Territorial Titles and International Situations), 75 *i* (The Obligation of Non-recognition), 94 *d* (The Different Types of Mandate), 106 (The Lateran Treaty, 1929), 107 (The Status of the Vatican City in International Law), 116 *a* (State Equality and International Organization), 127 *a* (Subversive Activities against Foreign States), 130 (What Acts of Self-preservation are Excused), 133 *d* (The Japanese Invasion of Manchuria (1931)), 155 *aa* (Abuse of Rights), 155 *d* (The Plea of Non-Discrimination), 162 *a* (Exhaustion of Legal Remedies), 167 *d* (The Constitution of the League), 167 *dd* (Amendments of the Covenant), 167 *h* (International Unions and Organizations under the Direction of the League), 167 *o* (Reconsideration of Treaties and International Conditions), 167 *oo* (Inconsistency with the Covenant of the League), 167 *u* (The Covenant of the League as a System of Legal Obligations), 197 (The Bosphorus and Dardanelles), 197 *f* (Wireless Communications), 241 *a* (Renunciation of War and Title by Conquest), 310 *a* (Hague Codification Conference and Double Nationality), 313 (Regulation of Statelessness by Treaty), 337 *a* (The Proposed Convention against Terrorism), 340 *gg* (The Essential Character of the International Labour Organization), 499 (Effect of Coercion of a State or its Representative), 503 (Treaties Inconsistent with Former Treaty Obligations), 554 *a* (Preparatory Work in the Interpretation of Treaties), 571 *a* (Organized Alliances).

Of particular interest at the present time is the new section on Recognition of Insurgency. One wishes that the Editor had been able to say more on this subject, which is treated all too scantily, if treated at all, in works on international law. Circumstances have shown that there is a crying need for a clearer definition of the rules applicable to that situation (which raises many and complicated legal problems) where a revolt or rebellion has reached a stage where it can no longer be regarded as a mere riot or breach of the peace, or its authors as criminals or pirates, but where the stage has not yet been arrived at when recognition of belligerency can properly be accorded, or where, that stage having been arrived at, such recognition is in fact (for whatever reason) not given.

The international lawyer at this time finds himself living in an unfamiliar and unpleasant, if interesting, world. There are wars which are said not to constitute war in law. There is peace which is not peace. It is said, as it has so often been said before, that international law is in abeyance and cannot survive the continual breaches of its rules and still more of the spirit of its rules that are taking place. A new edition of *Oppenheim* comes, therefore, as a useful reminder of the fundamental fact that in the long run it is easier to have rules and to abide by them than to have no rules at all; and that, for this reason at least, international law is likely to survive long after its present detractors have gone. The new edition, moreover, so ably edited by Professor Lauterpacht, demonstrates in a convenient and highly practical form the immense body of rules that go to make up the science of international law, and calls attention to the fact that for every rule that is, on occasion, broken, there are dozens so constantly and habitually observed that they have come to be taken as a matter of course.

Politische Pakte und Völkerrechtliche Ordnung. By Asche Graf von Mandelsloh. Berlin: Verlag Julius Springer, 1937. 116 pp.

The frequently heard thesis according to which the treaties of alliance concluded after the world war with a view to protect the *status quo* are to blame for much of the unrest in the world to-day is forcefully set out in this volume. Count Mandelsloh attempts to show that these treaties were not only bad politics, but also bad law. He describes it as an essential function of the international community to facilitate a progressive adjustment of conflicting interests. The main instrument of such adjustment is not the judicial tribunal, usually bound by those rules formerly made which leave the conflicts unsolved, but the flexible process of diplomatic negotiations culminating in the conclusion of a treaty. Any treaty which aims at making negotiations less flexible, by ensuring in advance the negative attitude of the parties to proposals envisaging a revision of the *status quo*, is therefore contrary to, and "destructive of", the international public order. This holds true whatever the specific form of the particular treaty. Treaties of alliance directed against the eventuality of revisionist tendencies of third states, treaties concluded among states with opposing interests and restricting the liberty of action of a party previously bent upon revision, even—as in the case of the treaties with the Soviet Union—treaties of non-aggression and neutrality, come under this heading. The treaties of Locarno are singled out for detailed criticism in this sense.

As an analysis of the political meaning of treaties, the volume is challengingly and interestingly written.

BENJAMIN AKZIN.

Diplomatic Correspondence of the United States: Inter-American Affairs, 1831–60. Vol. VIII (Mexico). Selected and arranged by W. R. Manning, 1936. Carnegie Endowment, Washington. xliv+1106 pp. ($5.00.)

There is a certain amount of overlap between this and the two preceding volumes of Dr. Manning's monumental work. The present volume is of more than usual interest to students of international law, for it covers the period of the revolt of Texas, the annexation of Texas to the United States, and the war with Mexico to which this annexation gave rise. For this reason the papers printed are largely occupied with such questions as those of belligerency, recognition, neutral rights and duties, and state succession. Students in search of precedents will find much material that is of interest in its relation to the problems of our own day.

The editor's brief footnotes aim only at supplying necessary references and exclude all comment, so that the documents are left to speak for themselves.

H. A. S.

Juridical Bases of Diplomatic Immunity. By Montell Ogdon. Washington, D.C.: John Byrne & Co., 1936. xx+254 pp. ($4.00.)

The greater and more valuable part of this work consists of the three chapters on Territorial Immunity as explained by the fiction of "extra-territoriality", Personal Immunity as explained by the theory of "representative character", and Functional Immunity as explained by the necessity of protecting the channels of communication between states. Though one gets the feeling that this tripartite treatment is not the natural product of the material and is being forced upon it, the author is here more at home with his material and more satisfying to his readers than in the "process of tracing the evolution of the law and the concretization of theories in the formative period of the law", with which the book opens, and in the critical and creative efforts with which it is brought to a close. It is easy to forgive the heavy reliance upon second-hand authorities —especially when the ancient and medieval world is under review—and a Roman lawyer must try to forgive the apparent confusion of *jus naturale* and *jus gentium* that culminates in the remark that "at Rome, the sacred rights of ambassadors were derived, at one and the same time, from the *jus naturale* and the *jus civile*". It is not, however, so easy to resist the feeling of disappointment that would be less acute were it not for the author's way of announcing his intentions and making his promises with, as it were, a fanfare of trumpets. After the heralding of the analysis of "recorded instances of early embassies" the reader cannot be blamed if he expects a more vivid conclusion than "Necessity and the recognition of mutual advantage were among the forces which compelled the recognition of the diplomatic privilege". Even the conclusion of the final chapter —that diplomatic immunity ought to be restricted to what is necessary and adequate for the protection of the agent in the performance of the diplomatic function—seems less satisfying because of high hopes expressed in the preface and implied in the long and slow dissection and destruction of unsound theories.

Of the author's diligence and care there can be no doubt; text and footnotes reveal a panorama of scholarly effort that is concentrated in more than a hundred "Cases Cited" from a variety of jurisdictions and in "Sources Cited" that spread from Deuteronomy and Chronicles and the Triads of Dyvnwal Moel Mud to the Anales Judiciales of Peru for 1921. Let the reader ignore the apparently useless reference to a French translation of Justinian in 1805, and the mistaken attribution of *Stephen's Commentaries* to Sir Fitzjames Stephen, and he will find in these pages a full and up-to-date guide to the literature of jurisprudence as well as international law. The book, however, loses rather than gains in strength from so many digressions into these fields; the window-dressing is not a success. Why is it necessary, not only to emphasize "the value of history in illuminating the future" and to quote in support from Savigny and Maine and Maitland, but even to say where Maitland is cited by Cardozo and to add some heavy words of Steinmetz complete with their citation by Vinogradoff? Again, what is the purpose of quoting, not the maxim *cessante ratione legis cessat lex*, but the variant of Professors Sabine and Shepard?

H. J. S. Jenkins.

Diritto Internazionale Pubblico. By G. Balladore Pallieri. Milano: Giuffré, 1937. (Lire 45.)

There are so many modern books on public international law—bulky treatises and slender manuals—that one is apt to ask whether there is room or justification for yet another. Yet the law of nations is so fluid that a new book on the law of peace (which in Oppenheim's words "is the centre of gravity of international law") is welcome, if the author contributes something new and worth having.

Such a contribution is certainly made by Professor Balladore Pallieri—who treats international law as a body of rules not only morally but also legally binding and enforceable—if only because he successfully endeavours to adopt a new system in dealing with his subject. In so doing, he introduces into the field of the law of nations the classification of *diritti subbiettivi*, *diritti affievoliti*, and *interessi*, which occurs in treatises on the administrative law of Italy and of other continental countries (especially Germany); and he freely refers to analogous doctrines prevailing in Italian municipal law—a *positive* law *par excellence*.

In view of the many distinctive qualities of Professor Pallieri's work, it is unfortunate that on some vital questions of international law he has not followed his strictly legal method.

Thus, for instance, he maintains (pp. 290 *et seqq.*) that a successor state has no duty—under international law—to respect the acquired rights of individuals who belonged to the state which has ceased to exist and who have become its own subjects. Yet, in view of the peace treaties concluded after the last war, it cannot be denied that recent practice is rather to respect such acquired rights of individuals, not only if foreigners (as the author admits), but also if they have become subjects of the successor state. Not only is this practice undoubtedly more in conformity with the fundamental principles of morality and equity and in accordance with the legal principle *res transit cum suo onere*, but it seems also to be endorsed by the Permanent Court in its Advisory Opinion on "the Settlers of German origin in Territory ceded by Germany to Poland", Series B, No. 6.

Among the grounds for the dissolution of treaties the author includes a vital change of circumstances; and although he admits that in the vast majority of cases the clause *rebus sic stantibus* cannot be considered as an implied condition, yet he repeats what others have stated, that the doctrine of *rebus sic stantibus* is a recognized rule of international law. The author goes so far as to say that 'ove vi sia disaccordo tra gli Stati interessati in riguado alla sussistenza o meno di un mutamento nelle circostanze di fatto, . . . il soggetto che crede verificatasi la causa di estinzione potrà intanto non osservare il trattato' (p. 130). On another occasion I have observed that statements like these may represent the theories of a politician, but cannot be regarded as sound legal doctrines. I think that the author would have rendered a service to the science of the law of nations if on this point also he had referred himself to Italian municipal law which—according to the Italian Court of Cassation—rejects the doctrine of *rebus sic stantibus* altogether. Such an application of a principle of municipal law to cases of international law would have been the more appropriate in view of the fact that the principle *conventio omnis intelligitur rebus sic stantibus* was imported into the law of nations from municipal law.

Limited space prevents me from touching on several other points which deserve attention. But, dealing with the law of peace, I cannot pass over a subject which has lately been in the limelight—the renunciation of war.

The use of force, not only in disputes relating to "subjective rights" (which the author calls *controversie giuridiche*—justiciable disputes), but also in those concerning "simple interests" (which the author terms *controversie politiche*—political disputes) was permitted under general international law. But the *legal* position (and the author invariably endeavours to treat all questions from a strictly legal point of view) has undoubtedly changed as the result of the Covenant of the League of Nations, and still more of the Kellogg Pact of Paris. Under this Pact, war—to repeat Mr. Stimson's words— "is an *illegal* thing". Now, so long as the Kellogg Pact is in existence, it is law; indeed, a fundamental law. In a work which is intended to treat international law as a body of rules, not of mere morality but of real law, it is difficult to understand how the author, after having briefly referred to the Kellogg Pact, can dismiss it with a few rather scathing words. The author thus misses his chance of making a contribution to the building of a new international law. At no other period have there been so many treaties the aim of which is to oppose changes brought about by force and to uphold the principles of law. Never has a writer of international law been in a better position than to-day to show that (to quote Kant's *Perpetual Peace*) "the conception of the Law of Nations as containing the right to war is really meaningless".

GUISEPPE M. PALLICCIA.

Les Principes du Droit des Gens Moderne. By Professor Robert Redslob, of Strasbourg. 1937. Paris: Rousseau. 329 pp.

This book, written in October 1936, makes strange reading in the light of the Sino-Japanese conflict, and of the civil war in Spain. For it is based, as the author acknowledges, on Alvarez's "Declaration of the main principles of modern international law", the forty articles of which are frequently quoted. It is divided into two parts: the constructive principles determining the nature and subjects of international law, and the laws derived from the ideal of justice, which govern the relations of the subjects.

Among the different types of international law, the author recognizes American customary law, with its special rules governing rivers. The Dominions, he says, are subjects, but India is not. The Law of Nations is a contractual law between states, and recognition is essential to give a new power contractual rights. But recognition of states and their governments is indistinguishable, and in the case of a rebel government the test should be: is the rebel alone capable of carrying on warfare in his portion of territory? Among the types of states, Egypt is described as a vassal of Britain and no mention is made of the recent Anglo-Egyptian treaty; mandated territories are subjects of the League, whereas Bhutan and Nepal are British protectorates, and the British Empire is merely a *modus vivendi.*

The rules of law define the fundamental rights of states, an admirable chapter being devoted to intervention; yet no mention is made of the Montreux treaty allowing admission to the Black Sea for humanitarian purposes.

Solidarity is a duty among states, and these must also respect the fundamental rights of men. The last chapter is a masterful discussion of the old theory of just war, leading to the author's conclusion that there is now a right to peace, and a duty to associate for self-defence. Neutrality he believes is decaying and there is perhaps a tendency towards a Universal State. Throughout the whole book there is a strong moral background.

J. C. HALES.

The Test of the Nationality of a Merchant Vessel. By Robert Rienow. Columbia University Press. London: Humphrey Milford. 244 pp. (14*s.*)

The author of this book is Instructor in Social Studies in the New York State College for Teachers.

After an explanation of the meaning of the word "nationality" as applied to a merchant vessel, the writer proceeds to an examination of the various tests by which the nationality of a vessel might be determined under international law. In the early chapters of the book he deals in turn with the question whether the building of the vessel in the national territory, the manning of the vessel by a crew composed of nationals of the state, the owning of the ship in whole or in part by nationals of the state, and the hoisting of the flag of a particular state constitute respectively a basis sufficient internationally to determine the vessel's nationality; each of these criteria is discarded in turn. Nationality is determined by the official papers which are issued to a vessel which complies with the requirements of the municipal legislation of the state in whose merchant marine the vessel is incorporated. Each state fixes for itself the conditions with which a vessel must comply for this purpose. The volume also deals with the question of enemy character, as distinct from enemy ownership, and with that of the criminal jurisdiction over those on board.

It is not until the reader is approaching the end of the volume that the author's purpose in writing it becomes apparent. In 1909 a new criminal code was enacted in the United States. By the terms of that code all vessels belonging in whole or in part to any citizen of the United States are subjected to the jurisdiction of the American courts. In 1931 there were 440 American-owned vessels under foreign registry, and the effect of the above legislation is that in the case of all these vessels there is an American jurisdiction which is concurrent with that of the flag state and in some cases might claim to oust it. The author does not conceal his opinion that this American claim to jurisdiction over vessels merely because they are owned by American citizens cannot be reconciled with the generally accepted principles of international law.

It is impossible to read the volume without perceiving that the author has collected and examined a vast amount of material on which to base his conclusions, and without realizing also that these conclusions are in accordance with sound doctrine.

C.

Die Lehre vom Primat des Voelkerrechts in der neueren Literatur. Von Walter Schiffer. Leipzig and Wien: Franz Deuticke. 1937. 287 pp.

The author lays stress on the necessity to clarify the notion of the "Primat" (translated as "primacy" f.i. by *Garner* in *American Journal of International Law*, 1938, p. 184) of international law which broadly denotes the "supremacy" of international over municipal law (*Oppenheim*, Vol. I, 5th ed., p. 36). He sets out the theories of Krabbe, Duguit, Scelle and Kelsen and tests—accepting their respective premises (*Voraussetzungen*)—how far each of those theories can be regarded as logically faultless (*ohne inneren Widerspruch*).

The author does not wish to give the impression that English and American authors made no contribution to the question of "primacy" but refers only to the works of Professor Laski (p. 263).

The problems discussed by the authors have been recently considered by, amongst other English and American authors, Professor Brierly (*Recueil des Cours de l'Academie de droit international*, 1936, Vol. 58) and by Edwin M. Borchard (*Recueil d'études sur les sources de droit en l'honneur de François Gény*, 1935, Vol. III.) Dr. Schiffer's book is well written and is a useful contribution to the theory of international law.

V. R. Idelson.

Legal Machinery for Peaceful Change. (New Commonwealth Institute monograph.) By Professor Karl Strupp. Preface by Georges Scelle. London: Constable. 1937. xxvi+85 pp.

It is well that attention should be concentrated on that major problem of international life—how to secure that the changes in international relations which the terrestrial process makes inevitable may be accomplished without war (declared or undeclared) and solely by peaceful means. The New Commonwealth Institute does well to attack the problem. But whether the attack is on the right lines is another question. A "Permanent Court of International Equity" consisting of nine members, five of whom at least are to be international lawyers, and none of whom may exercise "any political or administrative function", commissioned to decide by procedure of a legal character all political disputes (i.e. all disputes in which the parties do not "contest against one another certain rights"), is hardly likely to command that deference from the world at large which is essential to such an institution if it is to possess what is in reality not so much judicial as *legislative* authority world-wide in extent. This point indeed is emphasized in the very convincing and critical preface contributed by Professor Georges Scelle—a preface which must leave the reader in doubt how far Professor Strupp's scheme represents the policy of the New Commonwealth Institute. Peaceful change is a problem for statesmen, not for lawyers. It is chimerical to expect and mistaken to hope that the supreme function of international legislation will or ought to be committed even to the most highly qualified representatives of a learned profession.

Professor Strupp throws his proposals into the shape of a "Draft of an International Peace Convention concluded at The Hague, 193 . . ." (is the date a printer's error?), to which he attaches as an annex an "International Peace Charter" divided into four chapters—"Mediation", "Judicial Settlement", "Arbitral Settlement", and "Equity Settlement". Each article of the text is accompanied by a comment. The "Equity Settlement", which is the most novel and important part of the proposed machinery, is to be reached by the application of "the generally recognized principles of international justice—which ought to be law", and at the same time (is this a qualification of "International justice"?) "the parties agree to give the court the power to find any solution capable of eliminating their dispute and eventually its cause".

For the rest, it is to be observed that Professor Strupp gives the go-by to the Covenant of the League, and seeks inspiration rather in The Hague Convention of 1907, the General Act of 1928, and the Pact of Paris.

J. F. W.

Cases on International Law. By James Brown Scott and Walter H. E. Jaeger. St. Paul, Minnesota: West Publishing Company. 1937. lxix+1062 pp.

This is a new edition of Scott's *Cases on International Law,* of which the last edition was published in 1922. A study of the book shows that the editors have departed from the principles which were followed in 1922. In the preface of the earlier volume, Dr. Scott explained that he thought it better to confine the work to the English-speaking world, and not to include in the volume the many cases decided by foreign courts involving international law which had passed under his review; the hope which he then expressed being that corresponding collections of cases with an international character in foreign countries might be prepared by persons belonging to those countries. In the present volume this standpoint is abandoned. A much greater number of cases decided by foreign tribunals or by international tribunals are included than was the case in 1922. In the present volume some 350 cases are presented; more than half of them appear for the first time. This means that a great many of the cases contained in the earlier volume have now disappeared.

Great changes have also been made in the arrangement of the volume. The previous classification, based on peace and war, is abandoned, and the contents of the volume are distributed between substantive law and procedural law, all cases relating to methods of redress and to the settlement of international disputes being grouped under the division of procedural law.

The mass of material available for inclusion in such a work as a collection of cases on international law is so great that the choice must always reflect the individual taste of the compilers, but a perusal of the volume leaves one with the feeling that the work has been well done, and that the volume should constitute a valuable aid, both to the teaching and to the study of international law.

C.

Problèmes actuels de l'Organisation du Monde. I. Le Droit prophylactique de Guerre du Pacte de la Société des Nations et du Pacte de Paris par Karl Strupp. *II. L'Union Panaméricaine et la Société des Nations* par J. G. Guerrero. Leiden: Sijthoff. 1937. 59 pp.

These are three lectures given by Professor Strupp at the Francisco Vitoria Institute at Salamanca in October 1933, and a short address—for which no date or place is given but which from internal evidence may be dated in 1936—by M. Guerrero, now President of the Permanent Court of International Justice.

A great part of Professor Strupp's lectures is directed to an examination of the Covenant of the League: it is noteworthy that he interprets Article 11 as conferring very wide powers: "There is no material limit", he says, "for the League of Nations acting" (under this article) "as guardian of the Peace." If this is right, more than one of the other articles of the Covenant are superfluous. But he concludes on rather a pessimistic note.

M. Guerrero, in his short but authoritative discussion of the possibility of developing co-operation between the League and the Pan-American Union, emphasizes the difference in the history, nature, and constitution of the two bodies: "The Pan-American Union," he says, "in point of organization and as an institution, is only in reality one more manifestation, among so many others, of international co-operation." It has, in fact, nothing comparable to the machinery and organization of the League. He concludes that "it would be childish to suppose that the United States, using the Pan-American Union as its mouthpiece, would agree to modify a position taken up for twenty years by all successive American Governments, democrat or republican."

J. F. W.

Völkerrecht. By Alfred von Verdross. Berlin: Julius Springer, 1937. 362 pp. (24 RM.)

This is probably the most important and most valuable single-volume text-book of international law published on the Continent since the World War. It would be a mistake to judge its scope merely by reference to the number of its pages. They are closely printed and could easily fill 600 pages of an average text-book. The book, which covers both the law of peace and the law of war, reaches a very high standard of accuracy and precision. It is one of the rare Continental text-books in which reference to judicial decisions constitutes a prominent feature not only of the footnotes, but also of the text. The sections are preceded by judiciously selected bibliographies composed mostly of books which have appeared since the World War.

In the first chapter the author gives a clear exposition of the basic conceptions and of the development of international law. In the second chapter, entitled "The Constitution of the International Community", he discusses the subjects of international law, its sources (particularly treaties), the municipal and international organs of the international community, the personal and territorial organs of the international community, the personal and territorial limits of state sovereignty, unions of states (in which he includes the League of Nations), state responsibility, and the various means for enforcing international law. The third chapter deals, in a somewhat haphazard order, with miscellaneous questions of peace and war. These are: fundamental rights of states, diplomatic intercourse, the position of aliens, minorities and stateless persons, state succession, communications and transit, cultural and humanitarian co-operation, settlement of disputes, self-help, and collective measures for preserving and enforcing peace by the League of Nations. The exposition of the law of war and neutrality covers about 40 pages.

The author has retained the progressive outlook which has contributed so much to making his work known outside the German-speaking countries. It is based on the view that the legal relations of states are governed not only by custom and treaty but also by general principles of law recognized by civilized states. One would think that this is a strong argument in favour of the opinion that international law is essentially like any other law. But, somewhat strangely, Professor Verdross is content to accept the trite formula of those who hold that international law is necessarily and permanently an imperfect law (p. 48) and that any radical improvement would transform the international society into a world state with the consequent extinction of international law. But, while this leaning to orthodoxy does not seriously impair the value of the book, it is to be hoped that the author may see his way to eliminate from future editions what must be regarded as purely political matter. The author does not do himself justice by elaborating such points as that "the Soviet Union constitutes not only a foreign body in the international society, but its very counterpart" (p. 27); that the most important task confronting European states is to remove the danger of a bolshevist world state (p. v); that the Treaty of Versailles is invalid both because of its inconsistency with the principles announced by President Wilson (p. 17) and because of its immorality; and that the League of Nations has become an instrument for strengthening the unjust *Friedensdiktate* imposed in a manner contrary to international law (p. 150). But these and similar passages are not at all typical of the treatise, which is often impressive in its restraint and caution.

Thus, for instance, with regard to the fundamental "rights of man", Professor Verdross limits himself to registering the practice of humanitarian intervention before and since the World War. But the student gets a glimpse of the author's view by reading that the post-war practice constitutes a retrogression when compared with the attempts at humanitarian intervention before the War (p. 237). His treatment of the subject of national minorities is detailed and highly suggestive. His discussion of the question of recognition is a model of clarity and precision, but one wishes that the author had scrutinized more closely the view which he put forward in 1926 in his *Verfassung der Völkerrechtsgemeinschaft*, and which he now repeats, to the effect that judicial decisions of courts of various states postulate the duty of recognition of municipal acts of unrecognized states (p. 113). The cases which he adduces do not prove this contention, and as a number of writers, including Kunz and Kelsen, have taken over the results of his inquiry, there is a good case for a re-examination of the matter. It may also be advisable to reconsider such statements as that the Covenant permits in some cases *aggressive* wars (p. 197), or that it is the duty of the state to penalize offensive utterances concerning foreign states and governments (p. 204), or that British prize courts do not directly apply international law (p. 309), or that the distinction between legal and political disputes—in so far as it has any fixed meaning at all—means one thing in the treaties of the Locarno type and another thing in the arbitration treaties concluded by the United States (p. 275). But as a whole this is a scholarly text-book in the best meaning of the word, and Professor Verdross ought to be warmly congratulated on its completion. It is to be hoped that the book will be widely used, not only in Austria and Germany but also in other countries.

H. L.

Pitt Cobbett's Leading Cases on International Law. Vol. II. *War and Neutrality.* 5th edition by W. L. Walker. Sweet and Maxwell; 598 pp. (25*s.*)

A case book is an attractive method of expounding a branch of law. The cases must, however, be supplemented by commentary and notes if their significance is to be correctly presented, and the proportion of space to be allocated to notes and cases respectively is always a difficult problem for the editor. In Pitt Cobbett, which has from its first edition always been a deservedly popular work, the commentary and notes have always occupied a relatively large space and contributed greatly to its value. In recent editions the preponderance of the notes had tended always to increase, and the present editor, while appreciating the utility of the mass of information contained in them, and endeavouring to retain it, considered that this tendency had been carried too far and he has endeavoured to restore the original relative proportions. If he has not been altogether successful, this is probably because it could not be done without sacrificing too much.

Mr. Walker has added about 20 new cases (omitting about 10 old ones) and some valuable new notes. For all he has done the present reviewer has nothing but commendation. The views expressed are generally sound and the selection is good. On the score of sins of *omission*, however, he is open to some criticism on the grounds: (1) failure to bring up to date; and (2) excessive (indeed almost exclusive) recourse to "Anglo-Saxon" sources.

Some topics which to-day are of hardly more than historical interest are treated too fully, and others of more actual interest are omitted or inadequately treated, while again other topics are still illustrated by old "cases" when more recent ones would be preferable.

The almost complete neglect of continental sources, as well as the very slight references to the decisions of international tribunals, is almost inexcusable and very regrettable. Amongst the judicial decisions, those of the English courts and the courts of the U.S.A. occupy some 200 pages, the decisions of international tribunals about 30 pages, and decisions of French or continental courts receive no more than a casual reference. But these neglected sources are rich, and on many topics, such as, for instance, the question of the rights and obligations of a power in military occupation of enemy territory, inevitably far richer than Anglo-Saxon sources, and it is highly desirable that they should become known in England. A case book is the ideal medium for their introduction to Anglo-Saxon readers. Moreover, they are not difficult to find. For judicial decisions since 1919, the Annual Digest of Public International Law Cases affords an admirable record, and the *American Journal of International Law*, *Clunet*, and the *Revue Général de droit international* go back many years.

The following more detailed suggestions are made for consideration for the next edition:

(i) Page 3 or page 341 (Effect of the Covenant of the League of Nations on neutrality); reference should be made to the important statement by Mr. Eden in the House of Commons, which is quoted in the *British Year Book* for 1936 at page 175.

(ii) Page 20 or 24 (Commencement of hostilities without declaration of war); some mention might have been made of the hostilities in Manchuria in 1931 and the Italian attack on Ethiopia in 1935. The Italian operations in Corfu in 1923, and the reports of the League of Nations committees with regard to them, afford a very suitable recent case for the discussion of forcible reprisals.

(iii) Page 40, line 4, the words "national status" should surely be "enemy or non-enemy character": otherwise the commentary is inconsistent with the case (Daimler case) which proceeds on the basis that nationality is not the criterion of enemy character.

(iv) Page 60; *Wolff* v. *de Oxholm* should now be omitted. It appears because of statements by Lord Ellenborough about the confiscation of private enemy property in time of war, which may be good international law, but which nowadays—*vide Luther* v. *Sagor* and other cases—would certainly not support the decision. The debt was situated in Denmark and extinguished by Danish legislation. An English court deciding between two private persons can only recognize this extinction by the *lex situs* while pointing out that if Danish legislation was contrary to public international law that is a diplomatic matter.

(v) It might be pointed out that the whole section on "Effect of war on intercourse with enemy" is an illustration of English (or United States) practice in a matter which international law leaves states free to regulate more or less as they will, rather than of any principles of international law.

(vi) Page 256, line 16; the word "some" is surely a misprint for "no".

(vii) Page 256; the information given is out of date so far as the British Dominions are concerned, in view of their new status.

(viii) Page 302 (legal effect of conquest and annexation on property and obligations); some reference might be made to the principles adopted in the

Peace Treaties, particularly in the Treaty of Lausanne Concessions Protocol, although these are treaty provisions.

(ix) Page 324 (claims based on war, by resident neutrals); some reference should be made to the Swiss war claims which occupied much time at two sessions of the Council of the League of Nations.

(x) Pages 400 *et seqq.* Treatment of belligerent warships in neutral ports, &c. The preponderance of "cases" taken from the Russo-Japanese war was justifiable up to 1914, but there have been many interesting cases since then.

(xi) Page 427. The case *Rex* v. *Jameson* (the Jameson raid) has really little to do with neutrality in time of war. It is odd to find no reference to the decision of the P.C.I.J. in the *Wimbledon* case under this heading.

(xii) Page 470, last line; the important word "not" is omitted.

(xiii) Pages 510 and 518. The international decision of the Hague Arbitration Court in the *Manouba* might well be made the *Case* and the old municipal decision of Lord Stowell in the *Atlanta* relegated to the notes.

(xiv) Page 524. The Hague rules of 1923 with regard to the use of wireless in wartime should be mentioned. The same applies to those of the same date with regard to the use of aircraft in war. Both sets of rules have been published in Cmd. 2201 of 1924.

(xv) Page 578. The rules drawn up at the Washington Naval Conference of 1922 with regard to the use of submarines against merchant vessels (1922 Cmd. 1627, p. 19), and repeated in an abbreviated form in the London Naval Convention of 1930 (1930 Cmd. 3556) should be mentioned.

E.

REVIEWS OF CURRENT PERIODICALS

The American Journal of International Law, Vol. XXXI, 1937. 781 pp., with Supplement Section of Official Documents, 203 pp. ($5.)

Familiarity with the pages of the *American Journal* cannot but increase one's admiration for its completeness as a guide to the literature, documents, and events of international interest, and for its excellence as a juridical commentary. In this volume the chief interest has passed from the Italo-Ethiopian dispute and centres round the civil war in Spain and the United States Neutrality Legislation, but a special interest attaches to the usual excellent first article by Judge Manley Hudson on "The Fifteenth Year of the Permanent Court of International Justice"—the year which saw his election to be a Judge. May one be permitted to congratulate Judge Hudson and the *Journal* of which he is a distinguished editor?

"The Italo-Ethiopian Dispute and the League of Nations" is reviewed in retrospect by John H. Spencer, former adviser to the Ethiopian Ministry of Foreign Affairs, who concludes that the League was unduly hampered by giving precedence to attempts made outside the League with a view to conciliation. Spain is dealt with by Professor Norman J. Padelford in two articles on "International Law and the Spanish Civil War" and the "Non-Intervention Agreement", and by Professor Vernon A. O'Rourke on "Recognition of Belligerency and the Spanish War". Miss Alice M. Morrissey deals with "The U.S.A. and the Rights of Neutrals, 1917–1918", while Mr. Dumbauld brings the history of "Neutrality Laws of the United States" up to the point at which it is concluded by Professor Garner's discussion of "The United States Neutrality Act of 1937".

We are taken back to Europe by Professor Quincy Wright's article "The End of a Period of Transition", dealing with the precarious position of vested rights in Upper Silesia, and by Miss Ruth Bacon's account of the difficulties concerning "Representation in the Danube International Commission", which were still unsettled when German co-operation with the Versailles River Commission ceased in 1936. More hopeful reading is Professor Charles G. Fenwick's excellent summary of "The Inter-American Conference for the Maintenance of Peace", at which he was one of the U.S. delegates, and Mr. G. Frederick Reinhardt's report of the "Rectification of the Rio Grande in the El Paso-Juarez Valley"—"a very happy combination of diplomacy and international engineering".

In articles of a more general nature Professor Alfred Verdross suggests an addition to Professor Garner's Report on the Law of Treaties (Harvard Research in International Law) which would admit that positive international law recognizes the invalidity of treaties concluded "contra bonos mores". These he defines as treaties which prevent a state from fulfilling the universally recognized tasks of the maintenance of order, defence against attack, care for the welfare of its citizens at home, and the protection of its nationals abroad. Mr. L. Kopelmanas deals with "The Problem of Aggression and the Prevention of War", and Mr. Denys P. Mayers with "The Bases of International Relations". Other articles are "Convention for Suppression of Traffic in Dangerous Drugs" by Mr. J. G. Starke, "International Co-operation of U.S.S.R. in Legal Matters" by Mr. T. A. Taraconzio, "International Law in Treaties of the United States" by Professor Robert R. Wilson, "The Growth of Purpose in the Law of Diplomatic Immunity" by Professor Montell Ogdon, and "English and American Courts and the Definition of War" by Mr. W. J. Ronan.

B. E. K.

Revue Générale de Droit International Public, 1937.

For reasons which it is easy to appreciate, the articles in the *Revue Générale* this year deal mostly with subjects of current interest. Professor Rousseau of Rennes continues his account of "Le Conflit Italo-Éthiopien", which began in the 1936 volume and is not yet complete; it is a full and well documented account of events and the legal questions relating not only to the application of the Covenant and other treaties but to the laws of war and neutrality to which they gave rise. It is to be hoped that, when complete, it may be published separately. Professor Strupp's article on "Problèmes soulevés à l'occasion de l'annexion par l'Italie de l'Empire Éthiopien" is confined to a short discussion of the question whether the unilateral act of annexation sufficed to produce legal effects from the point of view of international law, and of the relevance in this connexion of Articles 10 and 16 of the Covenant. Mr. A. L. Gardiner contributes an account of the system of jurisdiction over foreigners in Ethiopia during the years 1928 to 1936.

M. Berlia, who is also responsible for a long and appreciative review of the 1936 Year Book, has a good article on "La Guerre Civile et la responsabilité internationale de l'état", in which he quotes some interesting cases and points out that diplomatic arrangements sometimes effect a settlement of claims on lines that are not consistent with accepted principles, and that this is particularly likely in cases of civil war, where political considerations affect the attitude of other states. The same subject is dealt with in Professor Sibert's "La guerre civile d'Espagne et les droits des particuliers"; this reads rather like a "brief" in support of the claim of a certain Spanish company with French capital whose property in Spain has been subject to various measures of expropriation by the Valencia and Barcelona authorities, but it contains a useful collection of precedents. He concludes that the French Government are entitled to take up the case on behalf of the French shareholders, that the measures taken, even though applied equally to Spaniards, were contrary to international law, that restitution or full compensation can be claimed, that the Spanish Government is responsible internationally for the acts of the local Barcelona authorities, and that, if the civil war were to result in the disappearance of the Valencia Government, the succeeding government would be liable to pay compensation. Professor Cavaré's "L'idée de sanction et sa mise en œuvre en droit international public" is a full and thoughtful discussion of the subject; it is by no means confined to Article 16, though the application of that article against Italy naturally figures largely, and there is an interesting comparison between sanctions (in the strictly Austinian sense) in international and in municipal law. This article is followed by one by Dr. Berenstein on the sanctions provided in case of non-execution of conventions concluded under the auspices of the International Labour Organization. These sanctions, which are purely economic, have never, in fact, been applied, but it is interesting to note that they may be recommended by the Permanent Court of International Justice and may be invoked by nationals of a state against their own government. Dr. Reitzer, in an article on the registration of treaties, argues that Article 18 of the Covenant applies to *all* "international engagements", including treaties with non-member states, and that an unregistered treaty produces no legal effects at all. Professor de la Brière's "Les étapes de la tradition théologique concernant le droit de juste guerre" is an interesting account of the views of divines of all ages on the legitimacy and justice of war; to some extent it covers the same ground as Mr. Ballis's book, which is reviewed in the present Year Book. Professor Chevallier in "Le Traité d'Alliance Anglo-Egyptien" gives a good historical account of the events and negotiations since 1920 which led to the treaty; his account of the causes which led to final success is interesting. Professor Yepes contributes an account of the Pan-American Conference at Buenos Aires in December 1936, which, while enthusiastic, does not hesitate to point out important defects in the more important instruments adopted. Professor Kelsen's "Contribution à l'étude de la révision juridico-technique du Pacte" is a criticism of the wording of the Covenant and a statement of the amendments which, from a purely juridical point of view, the author considers necessary. The article is to be completed and at present only goes up to Article 9, but the author's amendments are somewhat drastic, and it is clear that his proposals would result in a Covenant differing considerably from the instrument with which we are familiar.

The English lawyer will welcome three notes on decisions of municipal tribunals on questions of international law, one by Professor Mervyn Jones on English decisions during the period 1932–6, one by Professor Rousseau on French decisions in 1935, and one by Professor Preuss and Mr. Joseph Kitchen on American decisions in 1936.

W.

Journal de Droit International (*Clunet*), *1937.*

The 1937 volume of *Clunet* contains some 19 articles of which it is only possible to make mention here of those of most interest to English readers.

1. Monsieur M. Y. Cordier writes on "La notion de domicile (France et Angleterre)", a most interesting article in which he brings out (*a*) the difference between the English and French conceptions; (*b*) that if English private international law applies the law of the domicil, as opposed to the law of the nationality, to determine questions of personal status, the practical difference is really not so great, since under the English conception of domicil it is so seldom that a British subject is held to be domiciled in non-British territory or a foreigner in British territory; (*c*) that French courts in applying the *renvoi* should, but often do not, apply the English and not the French conception of domicil. This article, though perhaps it overstates the case slightly under (*b*) and contains one or two explanations of English law which may not be quite accurate, is well worth study.

2. Monsieur M. Ancel writes a good article on "Les Conflits de Nationalité", the rules to be applied by the courts or authorities of a country (X) in order to determine which of two foreign nationalities possessed by an individual should be held to prevail. Under the master-nationality rule, of course, if one of the two nationalities was that of X, that nationality would always prevail in country X.

3. An interesting anonymous note on the question of the date to be chosen under French law for the conversion of a debt in foreign currency into francs when it is necessary to do this for the purpose of executing in France a French

judgment for this debt. The answer is the date of actual payment. English law gives a different answer, mainly because an English court, unlike a French court, cannot give judgment for the payment of a sum in a foreign currency.

4. A gloomy anonymous note on the "Régime des Étrangers en Égypte" written before the Capitulations Conference and in the light of the Egyptian Government proposals. This note may be compared with a subsequent more reassuring note on the results of the conference, giving the full text of the convention and annexed instruments.

5. Monsieur Philonenko contributes a very clear article on the execution of foreign judgments in France and Belgium respectively. There is some difference between the two countries, but in both cases the conclusion to be drawn is that a treaty is desirable.

6. The same author also writes a note on the "Expulsion of Stateless Persons" from France, which is not likely to make French people very satisfied with the position.

7. Monsieur Tenekides writes as the champion of a country, Greece, which has just deserted the ranks of the powers who adopted a three-mile limit for territorial waters, for those who favour a six-mile limit. The position really seems to be (*a*) that it is impossible for State A (a three-mile country) to establish affirmatively that State B has no right to establish a six-mile limit, but (*b*) it is equally impossible for State B to establish that State A is obliged to recognize the six miles, and the author's efforts to disprove (*b*) are not very convincing.

8. A. P.'s note on "Ordre public français et la révolution espagnole" shows that the French courts refuse, on grounds of public policy, to recognize foreign confiscatory decrees as operating to transfer property situated at the time in the country which enacts them even if the government enacting them is recognized. Under English decisions (vide *Luther* v. *Sagor*, &c.) the effects of such legislation are recognized as the law of the country effectively operative on property in that country and it is held that it is not for the courts to sit in judgment on foreign legislation.

9. There are five excellent articles on "Droit Fiscal International"—i.e. the application of French fiscal laws (death duties, stamp duties, taxes, and duties on transfers of property) in cases where foreign elements are involved. Some articles corresponding to this series in an English legal journal, explaining the effect of English legislation on similar points, would be welcome.

It is observed with some surprise that *Clunet* does not favour the British Year Book with a review.

E.

Revue Internationale française du droit des gens, 1937. Vol. III, Nos. 1–5, Vol. IV, Nos. 1–2.

This periodical is now in its second year. M. da Silva completes his article on "La technique du droit pénal international". M. Genêt discusses the meaning of "piracy" with special reference to the Spanish civil war. Fräulein Liebreich contributes a note on the "New German" conception of the law of minorities as expounded by Herren Walz and Raschofer. Professor J. B. Whitton, in an article on the question of raw materials, advocates, as a step towards solution, a "code of fair practices" to be interpreted in case of disagreement by an arbitral tribunal with compulsory jurisdiction. All parties to the code would be bound to adopt certain measures with regard to their colonies and with regard to foreign products which would promote economic equality amongst the nations. Professor Yepes, writing on "La véritable doctrine de Monroe et les conséquences de la Conférence de Buenos-Ayres (1936)" sees a modification of the doctrine in the recent foreign policy of President Roosevelt. Dr. Preuss has two learned articles on the non-extradition of nationals, with special reference to Franco-American relations, and to the recent decision of the United States Supreme Court in the *Neidecker* case. M. Caloyanni discusses declaratory judgments in relation to the procedure of the Permanent Court. In another article Dr. Preuss deals with denationalization for political reasons. There is a very clear article by M. Roberto Sandiford on "Les guerres civiles et le droit maritime international". In addition there are useful texts of recent treaties, including the Anglo-Italian Mediterranean Agreement, 1937, and documentation relating to the Spanish civil war, the Balkan States, and the Pan-American Union.

J. M. J.

Revue de Droit International et de législation comparée. Brussels. 1937.

The Revue maintains the high traditions of previous years, and contains several articles on questions of outstanding importance, although it may perhaps be said that some of the articles are too long, in the light of their purely local interest.

Mr. J. Hostie writes on radio-communications, and declares that the mistake has often been made of confusing Air and Ether, as the former brings into play the question of sovereignty. He believes that transmission and reception of wave-lengths are matters within the domain of the sovereign, whereas circulation in the ether is merely capable of appropriation, and the practice of states will determine whether world or national claims will ultimately prevail.

Two articles deal with extradition: Professor R. Meitani gives a summary of the extradition provisions of the new Roumanian penal codes; and explains that no laws existed previously in his country, but merely treaties regulating proceedings. Roumanian citizens and political criminals cannot be extradited, and where a "délit complexe" exists trial will take place in Roumania.

Dr. I. Slivensky writes on the Bulgarian law of 1935, which defines political crimes, and he suggests that an international agreement should be reached on that subject, which would aim at protecting the state, its head, and constitution.

Mr. N. V. Boeg considers the judicial position of Greeks in the Ottoman Empire in matters of taxation, and after tracing their historical position, states that they are liable to pay revenue taxes and war profits to Turkey.

Mr. L. Kopelmanas contributes a very lucid and interesting article on the conflict between international treaties and international law, and notes that modern states subordinate the international validity of a treaty to internal law. As a solution he advocates the adoption of the Swiss rule that a treaty must prevail, internally, or the American, that the last in date prevails. Internationally, he would give power to decide the conflict to an international organization.

Professor Mahaim gives a summary of the 1936 conventions of the I.L.O. relating to maritime labour, such as the eight-hour day, and the protection of seamen when ill.

Dr. E. Gordon writes on the Anglo-Egyptian treaty of 1936, and claims that Britain had no legal title to Egypt in 1882. He declares that the right reserved to Britain to keep troops in the Canal zone is incompatible with the convention of 1888, and he would welcome a new Suez Canal Convention.

Mr. Jules Wathelet, the Belgian delegate at Montreux, summarizes the British declaration of 1922, the treaty of 1936, and the new convention on capitulations. He notes that the status and capacity of foreigners is to be regulated by their national laws and that foreigners may choose to have their cases tried before the Egyptian national courts; he favours the creation of a tribunal to regulate conflicts between the national courts and the Mixed Tribunals.

Professor Balladore Pallieri of Milan, writing in January 1937, considers certain legal aspects of non-intervention in Spain. He takes the view that all states except Mexico have recognized *de facto* the insurgents, and these should be entitled to exercise the naval rights of belligerents. Franco's Government may in time be considered the government of Spain even though the Republicans continue to resist.

The late Professor Decencière-Ferrandière of Poitiers writes on Occupation. His article is the best modern contribution to the subject and is worthy of careful study. He shows that occupation is closely related to the acquisition of colonial territories in the nineteenth century and is of little importance nowadays. He traces the history of the Falkland Islands dispute and the Fashoda incident, and shows a preference for treaties, as avoiding the possibility of conflicts.

Dr. L. Reitzer considers whether the Franco-Soviet Pact is compatible with Locarno, and summarizes the main documents relating to the reoccupation of the Rhineland. He takes the view that the pact is really an alliance and that Germany could not legally object to it, but acted so as to safeguard herself politically.

The Review also contains important articles by Mr. Bagge on the gold clause in America, by Mr. Yepes on the Buenos Ayres Pan-American Conference of 1936, and by Mr. C. W. Jenks on recent advisory opinions given by the P.C.I.J. on the jurisdiction of the I.L.O. There are also obituary notices by Mr. Ch. de Visscher on Baron Alberic Rolin, and by Mr. M. O. Hudson on Ake Hammarskjold, together with the usual excellent reviews of books and periodicals.

J. C. HALES.

Niemeyers Zeitschrift für Internationales Recht. LII Band. Berlin: Vahlen. 1937.

This volume records the retirement from the editorship of the periodical of the venerable jurist who was its founder and gave it his name. Theodor Niemeyer attained the age of 80 on February 5, 1937. The respect and good wishes of British international lawyers will go with those of his German colleagues and disciples. The Zeitschrift is now in the editorial charge of Professors Kraus and Wahl of Göttingen University.

In addition to the usual reprints of documents and book reviews, the volume contains articles by Professor Krüger of Wittenberg College, Springfield, Ohio, on the organization of the United States for dealing with foreign affairs; by Professor Ganeff of Bulgaria on the theory of the administration of International Law; by Dr. Lundborg of Stockholm on the international capacity of non-sovereign states and some other international legal personalities (e.g. the Pope, the European Commission of the Danube, &c.), and by Hermann Mosler on the legal situation of traffic on the Rhine after the German note of November 14, 1936.

J. F. W.

Journal of Comparative Legislation and International Law, 1937.

Volume XIX of the *Journal of Comparative Legislation and International Law* is in the usual form, comprising, in addition to articles, a series of useful notes, notices of new books, and the familiar review of legislation.

Of the seventeen articles, four are of direct interest to the international lawyer. The responsibility for piracy in the Middle Ages is the subject of a learned article by Mr. Edward Lewis, embodying early materials on piracy and privateering. Sir John Percival reviews Mr. Feller's book on the *Mexican Claims Commission, 1923–4.* There is a valuable study of the international government loan, by Dr. Schmitthoff, in which he examines that important and anomalous institution in relation to both public and private international law and in the light of recent decisions of international and municipal courts. Mr. C. W. Jenks reports on the work of the sub-committee appointed at the twenty-first session of the International Labour Conference to inquire whether nationality, the flag, or registration, should be adopted as the criterion of the scope of maritime conventions. Mr. Jenks states and discusses the reasons which led them to prefer the test of registration.

Three important articles may be assigned to the head of jurisprudence. Professor Del Vecchio restates his theory of the statuality of law, and has some interesting suggestions concerning the juridical nature of international law. Dr. Weidenbaum is responsible for an excellent discussion on liberal thought and undefined crimes, being a short but thorough examination of the maxim *nulla poena sine lege* in its economic, political, and technical aspects, and with special reference to English law. Mr. C. J. Hamson contributes a brilliant review of the *Restatement of the Law of Torts.*

The remaining articles contain a wealth of material for the comparative lawyer, covering the following topics: evasion of the law; French company law; German company law; competition and the law; anti-trust laws of the British Dominions; Hungarian customary law; law reform in China; French law of domicil; early Danish criminal law; German civil service law.

International law topics dealt with in Professor Keith's notes on Imperial constitutional law are: declaration of war and neutrality, the non-intervention agreement, air navigation, British nationality, and multi-lateral treaties. There is also a note from Professor Jenks which calls for special mention, being a useful table of ratifications of international labour conventions.

R. Y. J.

Nordisk Tidsskrift for International Ret (Acta scandinavica juris gentium). Vol. VIII (1937).

A number of articles in this review pay tribute to the memory of three eminent Scandinavians whose death in the course of 1937 was a sad loss to international law: Marks von Würtemberg, formerly President of Svea Hovrätt (Sweden), Ake Hammarskjöld, member (and formerly Registrar) of the Permanent Court of International Justice, and Axel Möller, Professor of International Law at the University of Copenhagen.

The review will henceforward be edited by a Committee consisting of Dr. Brüel (Denmark), Professor Castberg (Norway), Dr. Gihl (Sweden), and Finnish and Icelandic members.

As usual, the review contains the lectures given at the Nobel Institute in

Oslo by Dr. Raestad: The new convention concerning the use of broadcasting in the cause of peace—Peaceful revision of critical international situations—The right of asylum—Extinction of states—Civil war and international law.

Mr. C. Wilfred Jenks contributes an interesting article on "The separation of the Covenant from the Treaty of Versailles". He concludes that if all that is desired is that the Covenant should be regarded as an instrument formally distinct from the other provisions of the various treaties in which it appears, the appropriate procedure would be the promulgation by the Assembly of a solemn declaration acknowledging this to be the position. A mere solemn acknowledgment of this kind would not require any ratification or consent from the states concerned. But if it is desired to do more than recognize that the Covenant can be regarded as a distinct instrument, the position is far more complicated. An agreement divesting the League of functions conferred upon it in certain parts of the peace treaties, for the amendment of which no other special procedure is provided, would seem to be of a type which could appropriately be accepted by simple signature. Alternatively, the parties might give their consent by signature to the coming into force of such an agreement on the registration of a limited number of ratifications, including those of states regarded as specially interested. For the purpose of formally recording that many of the provisions of the treaty vesting in the League powers which could be used with discriminatory effect against Germany are now time-expired or discharged, the suggested procedure for the formal dissociation of the Covenant and the treaty would be appropriate.

Mr. Gihl writes on "The Subjective Test" as a means of distinguishing legal and political disputes. Professor Möller contributes an article on the revision of the Covenant, and Professor Castberg considers a series of problems of international law in relation to the civil war in Spain.

J. J.

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(In this Bibliography the following abbreviations are used: Acad. dip. int. = Académie diplomatique internationale; Acta Scan. = Acta Scandinavica Juris Gentium; A.J.I.L. = American Journal of International Law; B.Y.B. = British Year Book of International Law; Grot. Soc. = Grotius Society Transactions; H.R. = Recueil des Cours, Académie de Droit International de La Haye; J.C.L. = Journal of Comparative Legislation and International Law; J.D.I. = Journal de Droit International; J.I.L.D. = Journal of International Law and Diplomacy; L.Q.R. = Law Quarterly Review; Niemeyers Z. = Niemeyers Zeitschrift für internationales Recht; Rev. de der. int. = Revista de derecho internacional; Rev. de dr. int. = Revue de droit international; Rev. de dr. int. et de lég. comp. = Revue de droit international et de législation comparée; Rev. de dr. int., des sci. dip. et pol. = Revue de droit international, des sciences diplomatiques et politiques; Rev. Gén. = Revue générale de droit international public; Riv. di dir. int. = Rivista di diritto internazionale; V.u.V. = Völkerbund und Völkerrecht; Z. f. aus. int. Privatrecht = Zeitschrift für ausländisches internationales Privatrecht; Z. f. aus. öff. R. u. V. = Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht; Z. f. V. = Zeitschrift für Völkerrecht.)

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